Condominium Conversion of Residential Rental Units: A Proposal for State Regulation and a Model Act

Bernard V. Keenan
Suffolk University Law School

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Housing Law Commons, Legislation Commons, and the Property Law and Real Estate Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol20/iss3/2

This Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
CONDOMINIUM CONVERSION OF RESIDENTIAL RENTAL UNITS: A PROPOSAL FOR STATE REGULATION AND A MODEL ACT†

Bernard V. Keenan*

[A] man's Self is the sum total of all that he can call his, not only his body and his psychic powers, but . . . his house, . . . and . . . his lands . . . . All these things give him the same emotions. If they wax and prosper, he feels triumphant; if they dwindle and die away, he feels cast down . . . .

William James' nineteenth century observation aptly characterizes the emotional downswing of many residential tenants experiencing the condominium conversion of their apartment building. Fearful of involuntary relocation and the immediate prospect of increased housing costs, tenants have attempted to forestall or halt the conversion plan by seeking legislative assistance. As a result of these efforts, state and local legislatures have frequently responded by enacting regulatory safeguards for tenants confronted by conversion plans.3

† Copyright © 1987 by Bernard V. Keenan. All rights reserved.

A compendium of "condominium conversion statutes" is presented in Comment, Con-
Current legal scholarship abounds with essays detailing those factors believed to have precipitated the conversion movement, and narrating the hardships endured by certain tenants who confront it. But the literature mainly analyzes judicial decisions confronting the constitutionality of legislatively enacted tenant protections.\(^4\) This Article deviates from the standard format by focusing on legislative responses. Given that legislative action is justified and constitutional, a wide array of possible enactments may be considered. Prudent regulation must fairly balance the competing interests of the property owner and the tenants, in addition to considering the public's need for condominium housing opportunities. Present laws often fall far short of this standard.

This Article has several objectives. Part I provides a foundation for discussion by briefly outlining the relationship between the recent history of the rental housing market and those factors prompting the conversion of apartments to condominium status. With this background information, the relevance of conversion legislation is more readily grasped. Part II seeks to establish that state government is the appropriate governmental entity to formulate legislation intended to protect individuals affected by the conversion of rental units.\(^5\) Federal legislation has addressed this

---


5. See infra text accompanying notes 42-66.
specific issue in the relatively unknown Condominium and Cooperative Conversion Protection and Abuse Relief Act of 1980. In this Act, Congress acknowledged the need for some control over the conversion process, but concluded that state and local governments already had significant regulatory authority and were the more appropriate bodies to exercise this power. Part II argues that state government regulation of condominium conversion should preempt municipalities from similar involvement. Part III reviews case law and highlights certain features of current state and local legislation. It also attempts to establish the constitutional limits of appropriate state and local conversion controls. Part IV offers a Model Act that a state legislature may consider for adoption. The model legislation is partially comprised of provisions culled from existing state statutes, local ordinances, and the Uniform Condominium Act.

6. 15 U.S.C. §§ 3601-3616 (1982). The federal act requires that tenants residing in converting structures with five or more units are entitled to adequate notice of the pending conversion and to receive the first opportunity to purchase units in the converted projects and that State and local governments which have not already provided for such notice and opportunity for purchase should move toward that end. The Congress believes it is the responsibility of State and local governments to provide for such notice and opportunity to purchase in a prompt manner. The Congress has decided not to intervene and therefore leaves this responsibility to State and local governments to be carried out.

Id. § 3605. Congress disarmed the legislation by failing to establish a deadline or an enforcement mechanism for state and local promulgation of the "notice" and "right of purchase" provisions. Furthermore, states and communities are authorized to "override" the federal act. Id. § 3610. It appears that the existence of the federal law has been of no consequence.

7. Id. § 3605.

8. See infra text accompanying notes 52-66.


Although the National Conference of Commissioners on Uniform State Laws continues to sponsor the Uniform Condominium Act as an independent legislative model, the Commissioners also decided to combine the Uniform Condominium Act with the Model Real Estate Cooperative Act and the Uniform Planned Community Act. The resulting model legislation is the Uniform Common Interest Ownership Act, which offers a common structural and regulatory scheme applicable to all three forms of common ownership. See UNIF. COMMON INT. OWNERSHIP ACT, 7 U.L.A. 237 (1982).

The Uniform Common Interest Ownership Act has been adopted by Alaska, Connecticut, and West Virginia. ALASKA STAT. §§ 34.08.010 to .995 (1985); CONN. GEN. STAT. ANN.
been inadequately treated or ignored by current laws. Part V presents an extended commentary on the Model Act. In this way, the Article offers a framework within which a state legislature may formulate appropriate legislation in the field of condominium conversion law.

I. THE RELATIONSHIP BETWEEN HOUSING MARKET FORCES AND CONDOMINIUM CONVERSIONS

An abundant supply of rental housing existed in the early 1970's, but the number of available units declined significantly by 1980. Numerous forces converged upon the rental housing market and produced an unattractive climate for significant construction. Soaring costs of land, finance charges, labor, and materials deterred building efforts. The dwindling supply of available rental units amid a growing population directly affected the national rental housing vacancy rate. In 1981, this vacancy rate dropped to one of the lowest levels since 1960.

Although rental vacancy rates were low in the early 1980's, many apartment building owners nonetheless experienced a decline in profits because the operating costs of their structures increased. Furthermore, the existence of rent controls in cer-
tain communities and the failure of rental income to keep pace with inflationary increases influenced some owners to retreat from rental housing involvement. The condominium conversion route offered a profit-generating alternative, coupled with attractive tax advantages.

and high financing costs.

14. It is virtually impossible to offer a clear depiction of the intertwining relationships among rent controls, housing abandonment, and the national scarcity of rental housing. The presence of rent controls apparently contributes to an increase in real estate tax delinquencies. Real estate tax delinquencies increased 100% in Boston after the enactment of rent controls, and New York City's six percent delinquency rate since 1965 is the highest rate in 40 years. District of Columbia Appropriations for 1980: Hearings Before a Subcomm. of the House Comm. on Appropriations, 96th Cong., 1st Sess., pt. 4, at 215 (1979) (statement of Richard Francis, Executive Vice President Nat'l Rental Hous. Council).

Much attention has been directed toward the rent control ordinance adopted in 1979 by the City of Los Angeles. It is viewed as the prototype regulatory package of current times. For a detailed discussion, see Hill, As Rent Control Spreads Across Country, Its Friends and Foes Watch Los Angeles, Wall St. J., Feb. 1, 1980, at 40, col. 1. A recent study indicated that the Los Angeles program had reduced housing costs for long-term tenants, but had increased rents to above market levels for tenants who have recently moved. In addition, the study determined that rent controls had only a slight effect on lessors' rates of return and on the condition of the rental housing stock. Los Angeles Rent Restrictions Benefit Long-term Tenants, Study Shows, 14 Hous. & Dev. Rep. (BNA) 153, 154 (July 14, 1986).

The United States Supreme Court has strengthened the legal foundation for rent control by ruling that rent control ordinances are not facially inconsistent with the federal antitrust laws. Fisher v. City of Berkeley, 475 U.S. 260 (1986). But the Supreme Court is presently scheduled to review a local rent control regulation that requires a landlord to subsidize a tenant through denial of proposed rental increases based upon a tenant's economic hardship. It is alleged that the regulation violates the just compensation, due process, and equal protection clauses of the United States Constitution. Pennell v. City of San Jose, 42 Cal. 3d 365, 721 P.2d 1111, 228 Cal. Rptr. 726 (1986) (en banc) (ordinance upheld as not facially unconstitutional), aff'd, 56 U.S.L.W. 4168 (1987).

The reader should note, however, that a detailed HUD study failed to establish a statistical relationship between rent controls and the volume of condominium conversion because of the small number of jurisdictions with rent control and the variations in such laws. 1980 HUD STUDY, supra note 3, at V-16.

15. Some analysts have suggested that rent levels failed to keep up with the general inflation in costs and personal incomes due to "a perceptible shift in preference from renting to owning among those renters who could afford to consider it." Citizens Hous. & Planning Ass'n, Inc., Massachusetts Hous. Fin. Agency, Rental Housing in the 80's (1983) (Spring Conference Series Report) (statement of John Weicher, Former Deputy Director, President's Comm'n on Hous.). Home ownership thus offered an attractive hedge against inflation. Another reason derives from the fact that "rental housing markets are dominated by small scale operators." Small scale owners who wished to avoid tenant turnovers depressed rent levels. Id. (statement of Anthony Downs, Senior Fellow, Brookings Inst.) ("[S]mall landlords give rent concessions to good tenants, ultimately, in the aggregate, depressing the overall rental market.").

16. 1980 HUD STUDY, supra note 3, at V-25 to V-30. For an illustration of this profit-making opportunity, refer to Condominium Law and Practice, supra note 4, § 3A.04.

The tax advantages are clearly outlined in most of the previously cited law review
As a result of these economic pressures, 3.56% of the rental units in larger multifamily structures were converted to condominium ownership during the 1970's. This seemingly minor number of national conversions masked the concentrated activity occurring within certain localities. Almost sixty percent of the nation's 366,000 conversions from 1970 to 1979 occurred in only twelve of the country's thirty-seven largest metropolitan areas. Converted buildings usually contained a minimum of five residential units, even though smaller structures represent about sixty percent of the country's rental accommodations. Because the conversion of rental apartments to owner-occupied status often results in the displacement of tenants, the tightly grouped centers of condominium conversion influenced the rental vacancy rates of larger structures within these metropolitan areas.

In the 1980's, the national rental vacancy rate began to rise. The national rental vacancy rate for the first nine months of 1985 was approximately 6.4%. But these statistics can be misleading unless the somewhat imprecise nature of the information upon which they are based is recognized. For example, these statistics sometimes include apartments of questionable habitability. Also, the vacancy rate is higher in some sections of the articles. See supra note 4. A particularly thorough treatment is offered in Day & Fogel, The Condominium Crisis: A Problem Unresolved, 21 Urb. L. Ann. 3, 27-32 (1981).

17. 1980 HUD STUDY, supra note 3, at IV-9 n.9 (this statistic is based on multifamily structures containing five or more units).

18. Id. at IV-5, IV-8. The twelve high activity areas were Boston, Chicago, Denver-Boulder, Houston, Los Angeles-Long Beach, Miami, Minneapolis-St. Paul, New York City, San Francisco-Oakland, Seattle- Everett, Tampa-St. Petersburg, and Washington, D.C. The especially active Chicago and Washington, D.C. areas accounted for 31% of the nation's total conversions. Id.


20. California, Washington, D.C., and the metropolitan areas of New York City, Denver, Chicago, Boston, and Seattle head the list of areas hardest hit by housing shortages. National Council of Senior Citizens, Condominium Conversions: Options for Tenant and Rental Market Protection, reprinted in Condominium Housing Issues Hearing, supra note 2, at 86-96. Many of these metropolitan areas were previously noted as subject to significant conversion activity. See supra note 18.

21. HOUSING VACANCIES, supra note 12, at 1.

22. See Kurtz, Rental Shortage—Debate and Dilemma, Boston Globe, Dec. 31, 1983, at 37, col. 3; see also Bushnell, Rental Market: Good to Some, Grim to Others, Boston Globe, Aug. 20, 1983, at 33, col. 1; Scott, Figures on Vacancy Rates for City Rental Units Differ, L.A. Times, Mar. 16, 1982, pt. II (Metro), at 1, col. 1. These articles empha-
country due to an oversupply of rental units and well below the national average in other areas.\textsuperscript{23}

Because high finance and operating costs and low federal subsidies continue to forestall many developers from constructing multifamily rental structures,\textsuperscript{24} other factors probably account for the shift of direction in the national vacancy rate. For instance, the number of younger households has declined. This group has traditionally constituted a significant portion of the tenant market. But the high cost of living has prompted many of

size the unreliability of rental vacancy figures and the disparate formulae for determining the vacancy rate. The federal government computes the rate “by dividing the number of vacant units for rent by the total rental units.” It excludes “vacant units that are seasonal or held off the market.” \textit{Housing Vacancies, supra} note 12, at 9.

\textsuperscript{23} The oil-rich states of Texas, Oklahoma, and Louisiana, for example, constructed new rental units anticipating an influx of new residents that never occurred. In Houston, occupancy was less than 80\% in 1983. \textit{Multifamily Starts Predicted to Fail, 11 Hou. & Dev. Rep. (BNA) 28} (June 26, 1983). Apartment construction in the Sun Belt generally has boomed, resulting in a growing number of loan defaults and foreclosures. Celis, \textit{Sun Belt Apartment Construction Is Booming, Wall St. J., Oct. 16, 1985}, at 6, col. 1. Although most areas of the country have experienced their highest rental vacancy rates in the past two decades, the Northeast has recently seen low rental vacancy rates. \textit{Apartments and Condos: Apartments Up, Boston Globe, June 13, 1986}, at 66, col. 1. In the third quarter of 1985, the rental vacancy rate for the Northeast was 3.8\% as compared with the South’s 9.2\% vacancy rate. \textit{Housing Vacancies, supra} note 12, at 2. Boston’s vacancy rate is approximately 2\%. French, \textit{Few Apartments in City’s Future, Boston Globe, May 23, 1986}, at 71, col. 2. New York City’s vacancy rate is similar. Partially as a result, the rental amounts paid in these municipalities are the country’s highest. Gorov, \textit{Top Rents in Country, Boston Globe, Jan. 5, 1984}, at 23, col. 5.


Federally subsidized construction of rental housing has dropped sharply. The Reagan administration implemented a voucher system, which is a variation of a rent subsidy program. This program eliminated federal involvement in construction efforts, and the administration believes that an adequate supply of rental units already exists. Kurtz, \textit{supra} note 22, at 37, col. 3. A recent poll reveals, however, that 51 of the 66 cities surveyed reported a growing demand for housing assistance and an inadequate market to supply this need. Lublin, \textit{Declining Housing Aid Worsens the Struggle for Many Poor People, Wall St. J., Aug. 31, 1984}, at 1, col. 1.

The Reagan administration budget for 1988 provides for voucher distribution to 103,000 families, double the number approved by Congress for 1987. \textit{Creative Coupons for Poor Renters, N.Y. Times, Jan. 8, 1987}, at 26, col. 1. Some tenants have experienced difficulty in securing rental units under the voucher system because landlords accepting vouchers must improve the rental property to federal standards, pass annual inspections, and accept government involvement in settling tenant complaints. Lublin, \textit{Vouchers for Housing Help Some of the Poor, Fail to Benefit Others, Wall St. J., Nov. 19, 1986}, at 23, col. 2.
these individuals to double up or delay a move from their parental home. At the same time as the number of potential younger households has declined, the more financially able members of this younger group have opted for home ownership.

A second element contributing to the upswing in the vacancy rate is the introduction of increased numbers of single-family houses and condominiums into the rental market. A surge in the sales market, however, may remove many of the formerly owner-occupied units as rental housing. A steady national economic recovery is also likely to recreate demand for rental housing among some of this younger group.

A full understanding of the condominium conversion scene suffers due to a lack of reliable, broad-based statistics. Avail-

25. Bushnell, supra note 22, at 33, col. 1; Guenther, Rental Vacancies Start Rising Despite Drop in Construction, Wall St. J., Mar. 9, 1983, at 31, col. 1. In 1983-1984, 52% of men aged 20-24 lived with their parents. Forty-three percent of this group had resided with their parents in 1970. Delaying marriage and a "return home" after divorce contributed to this figure. More Young Adults Live With Parents, Says Study, Boston Globe, Nov. 8, 1985, at 17, col. 4 [hereinafter More Young Adults]; see also Adams, Fewer Nests Are Emptying, Boston Globe, June 17, 1987, at 1, col. 4.

High rental costs have also prompted many tenants to take in roommates to share expenses. Joyce, More Turn to Sharing to Cover Rising Rents, N.Y. Times, Aug. 25, 1985, § 8, at 1, col. 3.

26. Adults under age 30 usually constitute less than 20% of all households, but represent 37% of renter households. Softening in Rental Market Attributed to Decline in Under-30 Households, 11 Hous. & Dev. Rep. (BNA) 543, 543 (Nov. 21, 1983) [hereinafter Softening in Rental Market]. The addition of new households in the last few years has been running at about 1.4 million a year after averaging 1.7 million annually from 1970 through 1980. Fewer New Households Starting, Survey Finds, Boston Globe, Nov. 30, 1985, at 37, col. 4; More Young Adults, supra note 25, at 17, col. 4.

27. In 1982, an estimated 400,000 owner-occupied units were converted to rentals. Approximately 63% of these units were single-family houses. The addition of such units to the rental housing supply has noticeably dampened attempts to increase rents in areas such as Seattle and southern Florida. Harney, Rental Condo Market Booms, Boston Globe, Apr. 15, 1984, at A27, col. 2; Guenther, supra note 25, at 31, col. 1. See infra note 34 for a description of the oversupply of condominiums in certain geographic areas.

28. The nation's population grew 4.2% between 1980 and 1984. Households Growing Faster Than Population, Boston Globe, Sept. 30, 1985, at 16, col. 3. This signals a potential future demand for rental housing among younger households. At present, approximately 500,000 potential renter households are lost to the market due to the "doubling-up" process. Softening in Rental Market, supra note 26, at 543; see supra note 25 and accompanying text.

Recent census reports indicate a renewed interest in metropolitan area living that probably will result in a greater demand upon available housing. Peterson, People Moving Back to Cities, U.S. Study Says, N.Y. Times, Apr. 13, 1986, § 1, at 1, col. 1.

29. The 1980 HUD Study constitutes the only comprehensive source of condominium conversion statistics. See supra note 3. The federal government and states do not record conversion activity and "[m]ost major cities do not collate records on conversions, making credible statistics harder to come by than apartment leases." Franklin, Tenants Are Fighting a Rise in Conversions to Condominium Use, N.Y. Times, Oct. 21, 1979, § 1, at 18, col. 1.
ble information reveals certain markets to be strong,\textsuperscript{30} while national conversion figures are dropping appreciably.\textsuperscript{31} This phenomenon may be explained by the high cost of conversions. People interested in purchasing an apartment building for conversion are likely to encounter a high selling price. Once they have purchased the building, they may have to offer a financing program to attract condominium buyers. In the present economy, such costs can be an insurmountable hurdle for many developers.\textsuperscript{32}

In some communities many of the residential rental structures best suited for condominium ownership have already been converted;\textsuperscript{33} and certain municipalities have even been experiencing a glut of unsold condominiums.\textsuperscript{34} High interest and unemployment rates accompanied by slow income growth in younger households have also chilled the sales of condominiums in nu-


\textsuperscript{32} One study attributes the downturn in the number of conversions partially to the fact that "it became impossible for converters to pay the sellers' price for properties, provide a mortgage buy-down for unit buyers, and still make a profit. . . . [C]onverters could pay 45 percent of the projected sell-out price for a project, but prices were being bid up to 50, 55, and . . . 70 percent." Low Vacancy Rates, Seller Financing Called Keys to Successful Condominium Conversions, 10 Hous. & Dev. Rep. (BNA) 792, 792 (Feb. 14, 1983) [hereinafter Low Vacancy Rates].

\textsuperscript{33} E.g., Oser, supra note 30, at 26, col. 4 ("[T]he inventory of choice rental property in Chicago is modest compared with Manhattan, where years of controlled rents and little new construction has helped breed an intense and unsatisfied demand for housing.").

\textsuperscript{34} The inventory of condominium units has reached a record high, particularly in the Sun Belt states. Condo Sales Down Sharply in Sun Belt Markets, Survey Shows, 12 Hous. & Dev. Rep. (BNA) 970 (May 6, 1985). Condominium selling prices have declined by 15\% to 35\%. Sales in San Antonio and Houston have plunged by 50\%. Cells, Condominiums Fade as the Life Style Sours and Deflation Sets In, Wall St. J., Apr. 16, 1985, at 1, col. 6.
Numerous markets. Many of these unsold units return to the rental market. Furthermore, the conversion rate has declined because financially secure real estate syndicators, intent upon acquiring rental properties for depreciation benefits, compete directly with converters. For the conversion trend to regain vitality and offer the benefits of home ownership opportunities in a condominium setting, a decline in project acquisition and finance charges seems necessary. There also must be a greater disparity between the costs of new construction and the costs of converting rental units in order to attract developers to the conversion process. Although an adverse rate of inflation and other economic variables greatly influence the decisions of both developers and unit purchasers, many predict more favorable market conditions leading to an acceleration of the conversion pace.

Some have argued that the true impact of the conversion movement upon the rental housing scene is virtually impossible to assess. One significant proponent of this view is the Department of Housing and Urban Development (HUD). A study done by HUD in 1980 found no consistent relationship between conversion levels and rental vacancy rates. But this generalization based upon national statistics may not be true in certain locales. Conversions can be viewed as either a response to a strong

35. Prial, A Bright Future, But a Shaky Present, N.Y. Times, Oct. 9, 1983, § 12, at 15, col. 1. See generally Oser, supra note 30, at 25, col. 4 ("Outside New York, many conversion efforts have failed entirely, with the properties reverting to rental status . . . . In these cases, the properties usually revert to lenders."); Wall St. J., June 8, 1983, at 33, col. 1 (detailing the same situation in California and Texas); Conway, Pop Goes the Condo, FORBES, Mar. 14, 1983, at 14.

36. According to a U.S. Housing Markets survey, "the only significant conversions being started . . . involve properties which aren't attractive to syndicators." Condo, Co-op Conversions, supra note 31, at 1092; Low Vacancy Rates, supra note 32, at 792. Recent federal tax code revisions, however, create disincentives to investment for speculators with an interest in purchasing rental properties. See generally CONDOMINIUM LAW AND PRACTICE, supra note 4 (Spec. Supp.: The Tax Reform Act of 1986—Summary of Major Changes Affecting Real Estate 1987).

37. According to the Wall Street Journal, some "buyers regard condos as an alternative to, but not a substitute for, owning a single-family home." A Chicago study found that "two-thirds of the buyers of single-family homes were childless couples or singles, the logical buyers for condos." The report noted that "this situation could change quickly if prices catch fire again." Wall St. J., June 8, 1983, at 33, col. 1.

38. Various developers and analysts have commented that conditions are improving and "the conversion market is about to have a rebirth. [S]heep buy-downs for end loans are no longer needed." Low Vacancy Rates, supra note 32, at 792. In this context, "low-end condominiums which . . . are 'best sellers'" must be distinguished from "high-end condos, which 'are not moving at all.'" Multifamily Starts Predicted to Fall, supra note 23, at 29; Low Vacancy Rates, supra note 32, at 792. The pace of construction of new condominiums is holding relatively steady and accounts for 16.7% of single-family starts nationally. Oser, More Units, supra note 31, at 14, col. 3.

purhasing market or as an escape valve for rental property owners confronted by low-operating margins. The 1980 HUD Study does not provide firm conclusions on this issue. Moreover, the HUD Study's figures reflect lower mortgage interest rates than in recent years and a robust construction industry. The pinch of conversions upon the rental housing supply may well be more significant than what these outdated statistics reveal.

The currently rising rental vacancy rate conjoined with a national decline in the number of condominium conversions should not dissuade state legislators from considering the regulation of future apartment conversions. The conversion rate may never regain the vitality of the 1970's. But the forecast of renewed interest in conversion properties and condominium ownership should prompt legislators to determine and satisfy the concerns of tenants, project sponsors, and potential purchasers attracted by the prospect of condominium ownership.

II. An Argument for State Preemption of Condominium Conversion

Although the 1980 HUD Study indicates that approximately one-half of our state legislatures have adopted statutes relating to condominium or cooperative conversion, no state has explicitly preempted local regulation of such activity. Many communities do not regulate conversion of multifamily residential structures, perhaps due in part to a belief that the state has...

40. Id. at V-19.
41. As a New York State Commission reported:
   Many knowledgeable commentators and housing officials have concluded that the conversion of apartments to cooperative or condominium status is our best hope for long-range preservation of the housing stock. Experience in New York and elsewhere has demonstrated that conversions generate pride of ownership, the upgrading of properties and stabilization of neighborhoods. While it is undeniably true that conversions are most likely to occur in the more desirable residential areas, the past decade has witnessed a filtering down effect, with residential buildings in different areas of the state (and in all different price ranges) now undergoing conversion. The municipality gains, not only from the added impetus that conversions give to maintenance and improvement of residential buildings, but also from full payment of real estate taxes and a perceptible increase in the assessed valuation of properties that have undergone conversion.

2 NEW YORK STATE TEMPORARY COMM’N ON RENTAL HOUS., REPORT OF THE NEW YORK STATE TEMPORARY COMMISSION ON RENTAL HOUSING 2-111 (1980) (footnote omitted) [hereinafter TEMPORARY COMMISSION].
42. 1980 HUD Study, supra note 3, at XI-1. Most of the state statutes concern condominium conversion. Id.; see also supra note 3.
preempted the field. Other localities adopt ordinances that merely copy the state statutory provisions. Some offer supplementary protections. The latter group of local ordinances are often more restrictive than state legislation.

The litigation and controversy surrounding these laws reveal uncertainty concerning whether state enactments preempt local ordinances. A familiar pattern emerging from the case law emphasizes the failure of state legislatures to address the issue of preemption in a definitive manner. If the state legislature wishes to preclude municipal regulation of condominium conversion, then its statute should clearly and emphatically preempt the field.

Courts have rarely discussed the motivation behind any alleged preemptive legislation. Ambiguous and otherwise unartfully drafted legislation often directs judicial attention to-

44. Day & Fogel, supra note 16, at 55.
46. As the court noted in Bounds, 113 Cal. App. 3d at 886, 170 Cal. Rptr. at 348, “If the Legislature desires to preempt the decision making power of local governments in the field, it should specifically say so.”
47. Almost all of the cases cited supra note 45, are silent as to the reasons prompting state preemption of the condominium conversion field. In Hampshire House Sponsor Corp., however, the court recognized the existence of a “chronic statewide housing shortage” and concluded that the imposition of conversion controls “implicates complex economic, social and political issues. The state legislature is better equipped than most municipalities to formulate a comprehensive approach to this delicate problem.” 172 N.J. Super. at 434-35, 412 A.2d at 821 (quoting Helmsley v. Fort Lee, 78 N.J. 200, 243, 394 A.2d 65, 86 (1978)).
ward determining whether the legislation is preemptive, and if so, to what extent. In pursuit of this objective, courts have devised various formulae.

Instead of textually analyzing these tests, this Article considers the reasons underlying preemptive action. In general, state legislatures have preempted municipal regulation of numerous issues of general statewide concern or areas where uniformity of rules is desirable. Once state preemption has occurred, a conflicting or supplementary municipal law will be deemed invalid. State legislation even preempts a home rule community's claim of an independent legislative power.

With respect to condominium conversions, the availability of a suitable rental housing supply and the protection of tenants confronted by condominium conversions constitute issues of statewide concern. On this basis, a state government has adequate grounds to regulate the conversion of apartment buildings. Yet

48. Courts are required to devote considerable attention to determining whether a state statute preempts the condominium conversion field. An unambitious state legislative effort only exacerbates the problem. For examples of such state laws, see the statutes analyzed in City of Miami Beach, 404 So. 2d at 1068-69 and Rockville Grosvenor, 289 Md. at 87-93, 422 A.2d at 360-64.

49. The simplest judicial test for state preemption concerns a search for statutory terminology expressly preempts a topic from local regulation. Often such language is absent and a court then looks for an implicit preemption. In this case, detailed and comprehensive state regulation of an area may justify a court in concluding that the state legislature acted preemptively. In any event, a court may still overturn a local ordinance if it conflicts with a state statute. The cases cited supra note 45 reflect the various judicial formulae.

50. This Article avoids a detailed textual consideration of these judicial tests because it argues for state legislation that clearly prohibits local regulation of condominium conversion, obviating the need for imposition of the judicial tests.

51. O. REYNOLDS, HANDBOOK OF LOCAL GOVERNMENT LAW § 43, at 119-22 (1982). Examples of some issues necessitating the prohibition of local legislation include matters relating to criminal activity, the operation of the court system, the public health, the sale and consumption of liquor, certain licensing procedures, and education. Id. §§ 39-41 at 107-16; see also E. McQmLLIN, MUNICIPAL CORPORATIONS § 21.34, at 249 (3d rev. ed. 1980).

52. Home-rule municipalities are subject to the general laws of the state, . . . and if there is, as to a matter of general concern, a conflict between state law and the law of the home-rule city, the state law must prevail.

. . . . When the state has [preempted a particular field of activity], there is no room for city law on the matter, whether law of a home-rule city or a non-home-rule city.

O. REYNOLDS, supra note 51, § 42, at 116-17, § 43, at 120.

53. The fact that approximately 25 states have adopted conversion legislation supports the notion that the issues are of statewide importance. See supra note 42 and accompanying text.

54. See infra notes 71-76 and accompanying text.
a state legislature should weigh the alternative of permitting local municipal law to regulate condominium conversion. Because the impact of condominium conversion has been heavily concentrated in certain urban areas, many of these communities may assert themselves as the most appropriate regulatory body. Arguably, the local community should be allowed to deal exclusively with the conversion issue because it is most familiar with its current housing situation. This belief has swayed some state legislatures to delegate regulatory authority to municipalities. Although these concerns are understandable, ample justification exists for total state preemption.

Statistics indicating that widespread conversion activity is unlikely to occur in numerous communities within a state seem to strengthen the position of advocates opposing state preemption. But because large urban areas have experienced the most conversions, allowing these communities to address the conversion control issue may result in a regulatory scheme favoring the larger community's interests while isolating the local rental housing market from the concerns of neighboring communities, developers, and nonresidents seeking housing within a particular city or town. An insular municipal conversion policy may dissuade future apartment construction efforts, impose an inordinate demand for housing upon adjoining communities, and preclude a condominium ownership venture for current residents and nonresidents. In other words, the community may be too self-protective in designing its program. The state legislature

55. See supra note 18.

Massachusetts permits the communities of Acton, Boston, Brookline, Cambridge, and Somerville to regulate local condominium conversion. A uniform statute governs the remaining municipalities, unless the municipality elects to waive the statute and either preclude regulation or vary the state plan. Act approved Nov. 30, 1983, ch. 527, 1983 Mass. Acts 926.

57. See supra note 18. Many smaller communities have only a negligible number of apartment buildings.
58. For example, some commentators criticize the Massachusetts community of Cambridge for imposing a total ban on condominium conversion through its administration of local conversion controls. Cambridge "has refused to grant removal permits for vacant apartments even when those apartments were gutted prior to the passage" of the conversion ordinance "and [the unit] would not be returned to the rental market." A permit removing the apartment from rent control allows the owner to convert the unit. SMH CONTINUING PROFESSIONAL EDUC., AN IN-DEPTH ANALYSIS OF CONDOMINIUM CONVERSION 34 (1983).
offers a more objective deliberative body, bolstered by the state’s research and investigative abilities. State legislative committees have greater resources and more experience in dealing with housing needs from a regional perspective. The growth of the conversion of rental units to include additional urban and suburban communities enhances the justification for state involvement.

The desire for uniformity of rules also argues for state preemption. Municipalities unencumbered by preemptive state acts may be subject to intense local lobbying efforts and thus be likely to adopt varying tenant and rental housing supply protections. Some municipal bylaws and ordinances are conceptually unsound, vague, or result in claims of unfounded enabling authority and unconstitutional overregulation. These deficiencies ultimately require courts to adjudicate claims arising under diverse local laws. A uniform set of rules would eliminate the expense and time associated with the processing of numerous, similar judicial claims. Landowners, developers, and tenants deserve uniform regulation that bypasses the possibility of poorly drafted local regulations. State legislation may not be problem

59.

A review of the law and practices in the [condominium] conversion field reveals a maze of highly technical rules, many of which overlap . . . . This regulatory maze parallels the situation in the field of rent regulation generally, and adds to the confusion concerning the rights of tenants involved in conversion situations. Accordingly, the Commission recommends that the laws and regulations concerning conversions be made uniform throughout the state.

2 TEMPORARY COMMISSION, supra note 41, at 2-121.

60. The Massachusetts Supreme Judicial Court ruled that communities may regulate condominium conversion only pursuant to the grant of individual special acts promulgated by the state legislature. Accordingly, a community’s conversion plan could not be upheld as incident to the exercise of the zoning power. CHR Gen., Inc. v. City of Newton, 387 Mass. 351, 439 N.E.2d 788 (1982). A city also may not adopt conversion regulations incident to its power to operate the water and sewer systems, or the power to regulate traffic and city streets. Bannerman v. City of Fall River, 391 Mass. 328, 461 N.E.2d 793 (1984). These cases were decided prior to the adoption of pertinent state legislation mentioned supra note 56.

61. See infra notes 77-135 and accompanying text.

62. Landlords and developers support reasonable minimum statewide standards in the belief that they will forego dealing with numerous local variations. This became evident during consideration of proposed state legislation in Massachusetts. Blake, About Clout and Condo Conversions, Boston Globe, Nov. 27, 1983, at 29, col. 1; A Condo Advance, Boston Globe, Sept. 22, 1983, at 30, col. 1; Black, Condo Bill Consensus Called ‘Close’, Boston Globe, Sept. 13, 1983, at 19, col. 6; see also supra note 60.

A Maryland State Bar Association committee supported the concept of state preemption. The committee urged that the General Assembly enact “one statute that will govern condominiums in the entire State so that this important new phase of real estate development is not sectionalized on a county by county basis.” This excerpt of the report appears in Rockville Grosvenor, Inc. v. Montgomery County, 288 Md. 74, 83, 422 A.2d
free; however, issues of regulatory interpretation and scope are more effectively addressed by a single state enactment that reflects the resources available to state government.

As an initial investigatory measure, state and municipal building or housing officials should determine the sites of past, present, and proposed conversion activity. State legislators may then use this information in resolving their approach toward preemption. Among other facts, state governments may wish to learn the number of local conversions; the time span within which they occurred; the number of displaced elderly, handicapped, and low income tenants; relocation sites of displaced tenants; the municipality's total rental unit and vacancy rate figures; the location of concentrated areas of rental housing; the amount of recent multifamily housing construction; and the presence of major industries and employers in the community. By supplying such information, the municipality will in essence have conducted a mini-HUD Study. 63

The exact number of states preempting local legislation in this area is difficult to determine, because many statutes await judicial review to resolve the preemption issue. Although some states have acted in a somewhat preemptive fashion, 64 and certain states permit communities to adopt regulations more restrictive than those mandated by the state, 65 most statutes ap-


63. Of course, in many instances the actual HUD information may still be helpful. See supra note 3.


65. For example, the Maryland Condominium Act prohibits local governments from enacting condominium conversion laws that are more restrictive than the state protections. If a local "rental housing emergency exists," however, the community may adopt additional protections to benefit elderly, handicapped, and low or moderate income tenants. These supplementary protections are authorized by the state's Condominium Act. MD. REAL PROP. CODE ANN. § 11-140 (Supp. 1987). Minnesota adopted the Uniform Condominium Act's standard tenant protections with certain variations. For example, a city "may prohibit or impose reasonable conditions upon the conversion of buildings [to condominiums] only if there exists within the city a significant shortage of suitable rental dwellings available to low or moderate income individuals or families." MINN. STAT. § 515A.1-106 (1982). Virginia mandates certain condominium conversion protections designed to assist tenants in all communities. In addition, a county, city, or town "may enact an ordinance requiring the elderly or disabled tenants . . . be offered leases or extensions of leases on apartments they then occupied." VA. CODE ANN. § 55-
pear at least ambiguous. A definitive statement of state preemption is clearly preferable to the current haphazard condition of the law of condominium conversion.  

III. THE CONSTITUTIONALITY OF LEGISLATIVELY CREATED CONDOMINIUM CONVERSION PROTECTIONS

A state legislature seeking to foreclose municipal regulation of the condominium conversion process, and simultaneously desiring to adopt a statute of statewide application that offers protections to preconversion tenants, must attempt to determine the proper constitutional limits of such regulation. Unfortunately, existing case law sheds little light upon this topic. Very few state or local conversion regulations have undergone judicial scrutiny. Of those that have, litigation most frequently focused on questions of statutory interpretation or doubts concerning the authority for adopting municipal controls.

The success of a plaintiff landowner's challenge appears to depend upon the degree of state or local regulatory involvement. Statutory or municipal enactments offering minimal tenant protections have escaped judicial review, perhaps indicating either widespread satisfaction with the provisions or the belief that an unsuccessful legal challenge would result. Laws providing long-term statutory protections for tenants, on the other hand, tend


66. See infra note 142 and accompanying text for a sample statute providing such a statement of preemption.

67. See cases discussed supra note 45; see also Greater Boston Real Estate Bd. v. City of Boston, 397 Mass. 870, 494 N.E.2d 1301 (1986) (finding defendant lacked express or implied legislative authorization to require a landlord to obtain a permit from a municipal board before certain residential rental units could be converted); Bannerman v. City of Fall River, 391 Mass. 328, 461 N.E.2d 793 (1984) (holding condominium conversion ordinance conflicted impermissibly with the state's Home Rule Amendment and could not be justified as incident to the city's power to operate the water and sewer system or to regulate traffic and city streets); CHR Gen. Inc. v. City of Newton, 387 Mass. 351, 439 N.E.2d 788 (1982) (holding local zoning ordinance cannot serve as the basis for regulating condominium conversion if the ordinance only affects the ownership of the property); Goldman v. Town of Dennis, 375 Mass. 197, 375 N.E.2d 1212 (1978) (holding local zoning bylaw is permitted to control the condominium conversion of a nonconforming cottage colony).
to generate litigation. 68 The inadequacy of home rule powers, 68 alleged violations of equal protection 70 and substantive due process, and fifth amendment "taking s" challenges fuel most attacks upon the validity of condominium conversion statutes. Due process or uncompensated "taking s" claims seem to be considered most seriously by the courts.

The following sections offer guidance to legislators considering the adoption of a state condominium conversion law. Outlining relevant legal principles, including an analysis of due process attacks founded upon claims of improper legislative purpose or complaints of fifth amendment uncompensated takings, establishes a perimeter within which the adopted legislation is likely to pass constitutional muster.

A. Substantive Due Process—The Proper Exercise of State Police Power in Regulating Condominium Conversions

Laws regulating condominium conversion will generally be viewed as an exercise of the police power. 71 Courts reviewing

68. See discussion of the Loeterman and Flynn decisions, infra notes 111-17 and accompanying text.


70. An equal protection challenge, founded upon the claim that owners of residential rental properties are subjected to conversion restrictions that are not applied to other properties, is likely to fail. A reviewing court will uphold the regulation so long as the conversion restrictions are rationally related to proper statutory objectives such as protecting low income and elderly tenants, or maintaining a minimum number of rental units within the community. See City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Grace v. Town of Brookline, 379 Mass. 43, 399 N.E.2d 1038 (1979), and Reiner-Kaiser Assocs. v. McConnachie, 104 Misc. 2d 750, 429 N.Y.S.2d 343 (N.Y. City Civ. Ct. 1979), appeal denied sub. nom. Devereaux v. New York State Teachers' Retirement Bd., 51 N.Y.2d 705, 412 N.E.2d 1327, 433 N.Y.S.2d 1025 (1980) followed the rational basis analysis and denied property owners' equal protection claims in a condominium conversion context. See related discussion infra notes 103-09 and accompanying text.

71. Because the federal government is limited to specific enumerated powers, the police power is viewed as reserved to the states. B. Schwartz, CONSTITUTIONAL LAW §§ 23-24 (1972). In this sense the police power is difficult to define, but:

[i]t is used by the courts to identify those state and local government restrictions and prohibitions that are valid and that may be involved without payment of compensation. In its best known and most traditional uses, the police power is employed to protect the health, safety, and morals of the community. Sax, Takings and the Police Power, 74 YALE L.J. 36, 36 n.6 (1964); see also C. Rhyne, W. Rhyne & P. Asch, MUNICIPALITIES AND MULTIPLE RESIDENTIAL HOUSING: CONDOMINIUMS AND RENT CONTROL 6-16 (National Inst. of Mun. Law Officers Research Report No. 158,
such legislation apply a rational relationship test. So long as the statute bears a rational relationship to the proper objectives of a police power enactment, the law will be sanctioned.\textsuperscript{72} By attempting to safeguard preconversion tenants, condominium conversion regulations directly address problems related to rental housing shortages. Accordingly, these regulations may be viewed as enacted for the proper public purpose of promoting the general welfare of the populace. In reality, the judicial system long ago withdrew from intensively investigating claims of substantive due process abuse. A legislative measure is generally accorded a presumption of validity. This approach has been finely tuned in the areas of economic and social legislation,\textsuperscript{73} including legislative pronouncements concerning land use, rent control, and housing matters.\textsuperscript{74} Courts administering the rational relationship test avoid application of the more constraining strict scrutiny test and only reluctantly question the wisdom prompting such legislative acts. As a result, most courts affix a stamp of approval upon those issues considered best reserved for local attention.\textsuperscript{75} Regulation of condominium conversion falls within

\textsuperscript{72} See infra notes 74-75.

\textsuperscript{73} A review of decisions ranging from West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) to Williamson v. Lee Optical, 348 U.S. 483, reh'g denied, 349 U.S. 925 (1955), prompted the statement that Williamson "suggests that the Court will not only presume that a legislature had a reasonable basis for enacting a particular economic measure, but also will hypothesize reasons for the law's enactment if the legislature fails to state explicitly the reasons behind its judgment." J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 446 (2d ed. 1983).

\textsuperscript{74} The exercise of the police power is well-settled in the zoning area. See Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (validating zoning ordinance that deprived the owner of the property's beneficial use); Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926) (validating industrial zoning). The rational relationship test has also been applied to uphold rent control and eviction regulations. See Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922) (upholding a statute that placed limits upon a landlord's right to recover possession from holdover tenants during a housing shortage); Block v. Hirsh, 256 U.S. 135 (1921) (validating ordinance that permitted tenants a right of continued occupancy following the expiration of their leases during a housing emergency).

\textsuperscript{75} P. ROHAN, ZONING AND LAND USE CONTROLS § 35:04(1) (1984) ("Because of the strong presumption in favor of validity, a zoning ordinance will be struck down only if that presumption is overcome by a clear, affirmative showing that the law is arbitrary or unreasonable.").

The California Supreme Court avoided a strict scrutiny level of review when it considered the validity of an ordinance prohibiting removal of rental units from the housing market by conversion or demolition without a municipally issued removal permit. A landowner argued that his "fundamental right" to cease doing business as a landlord was infringed upon and "that this is constitutionally impermissible, absent a compelling interest . . . ." The court indicated that even if it accepted the landowner's theory, "we would be hard pressed to say that there is no compelling governmental interest in the
this established perimeter of a rational relationship test. Few lit­
gants have chosen to raise an argument of violation of substan­
tive due process rights, probably because improper legislative purpose is virtually impossible to establish in this context. A plaintiff-landowner must therefore establish a different basis for overturning condominium conversion legislation.

B. Condominium Conversion Laws as a Constitutionally Prohibited “Taking”

The fifth amendment’s prohibition against the uncompensated taking of private property for public use serves as a deter­rent to the exercise of eminent domain powers for private gain. Case law development of the “takings clause” indicates that an overly restrictive regulatory use of the police power will lead to complaints of an uncompensated taking. In this context, Justice Holmes’ “sliding scale” analogy in Pennsylvania Coal Company v. Mahon set the stage for numerous subsequent claims that an

preservation of scarce rental housing against destruction.” Nash v. City of Santa Monica, 37 Cal. 3d 97, 103-04, 688 P.2d 894, 899, 207 Cal. Rptr. 285, 290 (1984), appeal dis­missed, 470 U.S. 1046 (1985). The California Supreme Court also denied the property owner’s claim of involuntary servitude because a fair return ininvestment had been legis­latively guaranteed and the owner could “minimize his personal involvement by delegating responsibility for rent collection and maintenance . . . . He remains free under the ordinance to withhold rental units from the market as they become vacant. And, he remains free to sell his property and invest the proceeds elsewhere.” Id. at 103, 688 P.2d at 898, 207 Cal. Rptr. at 289. This procedure appears also to be available to unit owners under most challenged bylaws or ordinances.

76. See, e.g., Claridge House One, Inc. v. Borough of Verona, 490 F. Supp. 706 (D.N.J.) (invalidating an ordinance on a state preemption basis despite an assertion that a local regulation violated plaintiff’s substantive due process rights by improperly distin­guishing between forms of ownership), aff’d, 633 F.2d 209 (3d Cir. 1980); Griffin Dev. Co. v. City of Oxnard, 39 Cal. 3d 256, 703 P.2d 339, 217 Cal. Rptr. 1 (1985) (en banc) (adjudging an alleged substantive due process violation, based upon a community’s require­ment that a special permit be obtained in order to allow condominium conversion of an apartment building, as without merit).


78. 260 U.S. 393, 415-16 (1922). The often cited Mahon case is considered to be the landmark “takings” decision. Justice Holmes authored the majority opinion that viewed the difference between a valid regulation and an impermissible taking as a matter of degree. Because the opinion did not offer a precise “taking” formula, each future adjudication must be addressed on its specific facts. For a detailed discussion of the decision, see F. BOsselman, D. CALLies & J. BANTA, THE TAKING ISSUE 124-38 (1973); Rose, Mahon Reconstructed: Why The Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561 (1984).
excessive use of the police power amounts to an inverse condemnation of the property interest.79 These cases adopt a balancing test similar to that expected of a legislative body. Among other factors, courts consider the public benefit to be gained versus the degree of restriction endured by the landowner subjected to the regulation.80

The taking issue has proven to be an opaque topic for both the United States Supreme Court and a multitude of commentators.81 The Court readily acknowledges that no precise formula

Another Mahon-like factual situation was recently presented to the United States Supreme Court. In Keystone Bituminous Coal Association v. DeBenedictis, 107 S. Ct. 1232 (1987), the Court considered the validity of a Pennsylvania statute requiring that a percentage (i.e., 50%) of the coal deposit located below certain structures (e.g., residences, hospitals) must be left in place to prevent subsidence damage resulting from mining activity. Id. at 1237-38. The Keystone Court declared that the Subsidence Act did not constitute a taking because it protects and benefits the public, unlike the invalidated statute in Mahon that was adjudged to have been enacted only for the benefit of private owners of certain surface estates. Id. at 1242-46.

The Supreme Court also indicated that it was unlikely that a “taking” would result from a facial challenge to a land use regulation. The Court emphasized that it would require claimants to show that the regulation applied specifically to their property before it would consider it a taking. Id. at 1247-51.

Finally, the Court stressed that a determination of “reasonable use” remaining in property required an evaluation of the challenged regulation’s impact upon the totality of the property interest. Thus Keystone prohibits a landowner from focusing attention on one straw in the bundle of property rights and thereby claiming a taking of that particular aspect of property interest. As a result, the coal company could not successfully claim that the support estate was a separate segment of property for takings law purposes. Id. at 1248-51.

79. Many of the relevant cases are collected in 1 P. Nichols, Nichols On Eminent Domain § 1.42 (rev. 3d ed. 1987).


81. The confusion engendered by “ takings” case law prompted a noted commentator to refer to the relevant Supreme Court decisions as a “crazy-quilt pattern.” Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63, 63.

For a diverse sampling of germane publications, see generally B. Ackerman, Private Property and the Constitution (1977); Berger, A Policy Analysis of the Taking Problem, 49 N.Y.U. L. Rev. 165 (1974); Bozung, Judicially Created Zoning with Compensation: California’s Brief Experiment with Inverse Condemnation, 10 Envtl. L. 67 (1979); Freilich, Solving the “Taking” Equation: Making the Whole Equal to the Sum of Its Parts, 15 Urb. Law. 447 (1983); Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165 (1967); Sax, supra note 71.
has been devised for solution of these cases.\textsuperscript{82} The "sliding scale" test of \textit{Mahon} is premised upon Justice Holmes' observation that if a regulation goes too far it "will be recognized as a taking."\textsuperscript{83} This raises the twofold question of whether a police power enactment can ever constitute a taking or whether Justice Holmes "used the word 'taking' not in the literal Fifth Amendment sense, but as a metaphor for actions having the same effect as a taking by eminent domain."\textsuperscript{84} If used in the metaphorical sense, an overly regulatory land use enactment would violate a landowner's due process rights and would not constitute a fifth amendment violation.\textsuperscript{85}

The Supreme Court recently addressed this question directly.\textsuperscript{86} In \textit{First English Evangelical Lutheran Church v. County of Los Angeles},\textsuperscript{87} the Court announced that extreme regulation amounting to a taking violates a landowner's fifth amendment rights and entitles the landowner to a damage award arising from the self-executing remedial nature\textsuperscript{88} of the fifth amendment's just compensation provision. Although \textit{First

\begin{footnotes}
\item[83] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
\item[84] Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 198 (1985). The \textit{Williamson} decision is discussed infra note 86.
\item[85] Id.
\item[87] 107 S. Ct. 2378 (1987). \textit{First English} concerns the rights of a property owner allegedly denied all use of property following enactment of an interim zoning ordinance. The ordinance was adopted as a legislative response to a devastating flood that destroyed all structures located on the plaintiff's property. \textit{Id.} at 2381. For purposes of reviewing the sufficiency of the complaint, the United States Supreme Court assumed that the legislation denied \textit{all} property use. \textit{Id.} at 2384. The Court remanded the case for a determination of the actual facts. \textit{Id.} at 2389.
\item[88] \textit{Id.} at 2386 n.9. In addition to declaring the self-executing remedial nature of the fifth amendment, the Court offered the following insight and ruling:
\end{footnotes}
English provides a response to a longstanding controversy, the opinion fails to offer fresh insight concerning the "takings" test.

Lower courts must continue to interpret confusing precedent. The guiding opinions all too often do not significantly reduce the haze that presently shrouds the taking issue. Recent years have witnessed only a small number of courtroom confrontations where the claim of a fifth amendment taking has been lodged against condominium conversion legislation. Challenged regulations most often fall into categories requiring that affected tenants be notified of the conversion plan, permitted an opportunity to purchase their unit, or afforded relocation expenses.

Converters in litigation usually do not seek to overturn the basic notion of tenant protections, focusing rather upon the length of the statutory term within which the tenant may continue to reside in the apartment. Complaints most commonly allege a taking because the term is excessive or the ability to remove units from the rental housing supply is overly regulated. Although the challenged legislation will not explicitly prohibit conversion, complainants may claim that regulations effectively prohibit conversion, thereby infringing upon the owner's property interest (i.e., the owner's right to possess, to exclude others, and to alienate).

Analyzing existing case law on this particular issue provides a deeper understanding of the constitutional limits to condominium conversion regulation. Some of these decisions focus upon a balancing or sliding scale approach, though others emphasize the recently revived physical occupancy test.

1. Balancing test—Since the Mahon decision, the Supreme Court has periodically decided major cases relating the taking issue to land use laws. In general, these decisions illustrate the ambiguity and confusion surrounding this topic.
Penn Central Transportation Co. v. New York City, a major decision relating to landmark preservation, provides the most guidance as to what constitutes a taking. In that case, the Court reviewed the constitutionality of a local decision prohibiting erection of a commercial structure above Grand Central Station. Justice Brennan’s majority opinion reiterates the difficult nature of such cases and provides insight regarding the balancing process in “takings” determinations. In addition to ascertaining a law’s economic impact upon the property and the degree of regulatory interference with the claimant’s investment expectations, a court should weigh the character of the governmental activity, the public purpose motivating the regulation, the treatment accorded similar parcels, and any counterbalancing benefits to the property owner. After weighing these considerations, the Court upheld the constitutionality of the ordinance. Agins v. City of Tiburon essentially repeated the message of Penn Central in upholding the constitutionality of large lot zoning.

These cases summarize the somewhat vague balancing formula for “takings” delivered to the lower courts. An aggrieved owner of residential rental property, asserting that a condominium con-

95. Id. at 124-25.
96. Id. at 124.
97. Id. at 125, 129.
98. Id. at 133 n.29.
99. Id. at 137. In Penn Central, the owners were entitled to legislatively-prescribed developmental air rights that were transferable to permit development on at least eight nearby parcels. Id.
100. 447 U.S. 255 (1980). In Agins, the owners of a five acre parcel of unimproved land initiated suit against the defendant municipality after the city rezoned the parcel so that no more than five residences could be built on the land. A unanimous Court determined that the ordinance did not prevent the best use of the land nor extinguish any fundamental attribute of ownership. Id. at 258-59.
101. Agins achieved considerable notoriety due to the Court’s avoidance of a central issue—whether a claimant may recover damages for inverse condemnation if the land use regulation equals a taking. See supra note 86.
Model Act for Condominium Conversion 663

SPRING 1987]  

version statute violates the fifth amendment taking clause, must construct an effective argument based upon these guidelines. Because few judicial decisions have determined the constitutionality of condominium conversion laws, such a balancing test has rarely been adopted. Indeed, most of the pertinent state and federal case law using this standard arises from challenges to the regulatory enactments of several Massachusetts municipalities. A review of the litigation under these local laws is worthwhile because they are representative of the most stringent regulations in the field of condominium conversion.102

In Grace v. Town of Brookline,103 a property owner challenged a municipal conversion bylaw. The bylaw basically provided tenants in rent controlled apartments six months to move out if the apartment building was converted into condominiums. The six month stay could be extended an additional six months if a local rent control board determined that a hardship existed.104 After eliminating several of the property owner's claims,105 the Massachusetts court considered the takings argument. The plaintiffs contended that a taking results because the "Six Plus Six Amendment" "transfer[s] the right to possess from the owner to the tenant and compel[s] the condominium owner to become a landlord."106 The court ruled that attempting to minimize adverse effects upon tenants during a housing shortage through a regulatory term of possession constituted a reasonable exercise of the police power.107 Conceding that the owner's right of possession had been legislatively transferred to the tenant, the court likened the transfer to the reallocation of rights generally resulting from rent and eviction controls.108 The "period of delay" was not confiscatory because the owner was "eventually" entitled to possess the unit. During the interim period, the

102. Certain rental housing units in the Town of Brookline and the City of Cambridge are subject to condominium conversion regulations. See supra note 56. The subject units and the various tenant/rental housing supply protections are enumerated in the local bylaws and ordinances. Brookline, Mass., Bylaws art. 38 (Dec. 16, 1975); Brookline, Mass., Bylaws art. 39 (June 16, 1980); Cambridge, Mass., Ordinance No. 966 (June 29, 1981); Cambridge, Mass., Ordinance No. 980 (Apr. 26, 1982).


104. Id. at 46 & n.8, 399 N.E.2d at 1040 & n.8. The board had adopted a regulation governing procedures for determining "hardship." Brookline, Mass., Bylaws art. 38, § 9(a)(8) (Aug. 29, 1980).

105. The rejected claims included assertions that the bylaws conflicted with state laws and denied equal protection. Grace, 379 Mass. at 49-55, 57-59, 399 N.E.2d at 1042-45, 1046-47.

106. Id. at 55, 399 N.E.2d at 1045.

107. Id. at 56, 399 N.E.2d at 1045-46.

108. Id. at 56, 399 N.E.2d at 1045.
owner was statutorily entitled to a "fair net operating income." This relatively brief judicial analysis signaled a willingness to sanction a legislatively prescribed one year maximum term for protected tenants.

The "Ban Amendment" was subsequently enacted and constituted a more extreme form of regulation in this same Massachusetts municipality. Simply stated, the Ban Amendment entitled a preconversion tenant occupying a rent-controlled unit to a life tenancy unless the tenant provided the landlord with a basis for eviction. In *Loeterman v. Town of Brookline*, the plaintiffs purchased a tenant-occupied condominium unit after the Ban Amendment's effective date. The purchasers claimed that the amendment effectively redistributed a major property ownership right (i.e. the right to possess) because an owner may be perpetually prohibited from occupying the unit. Focusing mainly upon the *Penn Central* guidelines, the court found that the Ban Amendment served a valid public purpose by slowing the loss of rental housing units while the town searched for long-range solutions. Although recognizing that the right to exclude others is incident to property ownership, the court did not view the Brookline law as interfering with the owner's investment expectations because, at the time of condominium purchase, the liti-

109. *Id.* at 57, 399 N.E.2d at 1046.
110. The "Ban Amendment" replaced the "Six Plus Six Amendment" and indicates that the landlord may remove the unit from the rental market if

the landlord seeks to recover possession in good faith for use and occupancy of himself or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law, except that no action shall be brought under this paragraph to recover possession of a condominium unit from a tenant who has occupied the unit continuously since a time prior to the recording of the first unit deed for that unit following the recording of any master deed for the condominium.


Permissible bases for eviction of a particular tenant include: failure to pay rent; committing or permitting a nuisance to exist in the rental unit; conviction of using the unit for any illegal purpose; refusal to allow the landlord reasonable access to the unit for the purpose of inspection, repair, or other specified legitimate reason. *Id.* § 9(a)(1)-(6).


112. The court emphasized that the opinion would not consider the constitutional ramifications of applying the Ban Amendment to a unit purchaser who acquired title prior to the legislation's effective date. *Loeterman*, 524 F. Supp. at 1326. This precise issue had been presented to the same federal judge on an earlier date, and the court denied preliminary injunctive relief against the Town. *See Chan v. Town of Brookline*, 484 F. Supp. 1283 (D. Mass. 1980). *Chan* was dismissed for mootness when the tenant occupying the Chan's unit voluntarily vacated the apartment. *See Loeterman*, 524 F. Supp. at 1326.

gants were aware of the regulatory restriction on their ability to possess the unit.\textsuperscript{114} The court noted that the Ban Amendment did not deny the owners an economically viable use of the property.\textsuperscript{115} Further, the legislation was not permanent—the town could revoke it at any time.\textsuperscript{116} Applying \textit{Loeterman}, unit purchasers may never have the right to possess condominium units given an appropriate justification for the enactment.\textsuperscript{117}

The \textit{Loeterman} decision illustrates how the balancing test tilts in favor of the enacting legislative body. Under this approach to the “takings” issue, an individual purchasing a tenant-occupied condominium unit may have to wait until the tenant’s voluntary departure or death before occupying the property. This result follows from a determination that the public benefit arising from the legislation outweighs the hardship experienced by the unit owner.

2. \textit{Physical occupancy test}—In addition to acts of express appropriation, a governmental unit’s unauthorized and permanent occupation of private property will always be deemed a

\begin{enumerate}
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} The economic benefit is premised upon the rent control bylaws mandating a “fair net operating income” to the unit owners. \textit{Id.}
\item \textsuperscript{116} In reference to the possibility of revocation, the \textit{Loeterman} court noted that “[w]hether or not such an eventuality comes to pass, the permanence of the prohibition . . . does not render the amendment unconstitutional as applied to the [plaintiffs].” \textit{Id.} at 1330. The town’s failure to establish a definite date for expiration of the law does not prove fatal because the regulation is implicitly coextensive with the emergency rental housing shortage. \textit{Id.; cf.} Newell v. Rent Bd. of Peabody, 378 Mass. 443, 448-49, 392 N.E.2d 837, 840 (1979) (same reasoning applied to rent control regulations).
\item \textsuperscript{117} In Flynn v. City of Cambridge, 383 Mass. 152, 418 N.E.2d 335 (1981), the Massachusetts Supreme Judicial Court reviewed the constitutionality of a “Ban Amendment” condominium conversion ordinance as applied to all owners of those Cambridge condominiums subject to local rent control laws. Similar to the \textit{Loeterman} decision, the \textit{Flynn} court validated the ordinance as relating to condominium owners purchasing their units after the conversion regulation’s effective date. \textit{Id.} at 159-60, 418 N.E.2d at 339.

The court then adopted the rationale of the United States Supreme Court’s \textit{Penn Central} decision to uphold the application of the challenged ordinance to the unit owners acquiring title prior to the adoption of the law. \textit{Flynn} holds that the ordinance did not interfere with the preregulation buyers’ primary expectation concerning property use. Because certain units were already serving as rental housing on the effective date of the ordinance, the court determined that the local law merely perpetuated this use and thereby reaffirmed a unit purchaser’s primary expectation concerning property use. \textit{Id.} at 160-61, 418 N.E.2d at 339-40.

The \textit{Flynn} decision’s rationale seems flawed to the extent that it depends upon a “primary expectation” justification. Although the subject condominium units comprised a portion of the city’s rental housing stock at the time of purchase, it seems a quantum leap to conclude that this was a unit buyer’s primary investment-backed expectation relative to use. A unit owner may have purchased in reliance upon an earlier ordinance offering a unit owner the legal right to remove a tenant from a condominium following expiration of a prescribed possessory term.
taking. Numerous examples abound. In a sense, the physical occupancy test offers an attractive method for deciding the legality of certain governmental action. But application of this deceptively simplistic test engenders a host of legal complexities.

The United States Supreme Court’s most recent and explicit restatement of the test appears in *Loretto v. Teleprompter Manhattan CATV Corp.*, where the Court considered a “takings” challenge in light of a statutory enactment aimed toward assisting residential tenants seeking access to cable television. The statute provided that a landlord could not “interfere with the installation of cable television facilities upon his property.” The statute also limited the landlord’s compensation for the placement of cable equipment upon the apartment building to an amount determined by a state regulatory agency. The Court invalidated the statute, casting aside the balancing test and adopting the concept of a permanent physical occupation standard. The former test would have applied if the placement of cables and related equipment were viewed as temporary in nature. Despite criticism that the distinction between permanent physical occupation and a temporary physical invasion may be difficult to apply, the Court reasoned that, under state law, as long as the building housed tenants, a cable company’s occupancy of the property amounted to a permanent intru-

---

118. Kaiser Aetna v. United States, 444 U.S. 164 (1979) (finding government’s imposition of a navigational servitude requiring public access to a pond results in an actual physical invasion); United States v. Pewee Coal Co., 341 U.S. 114 (1951) (holding government’s seizure and direction of operation of a coal mine amounts to a physical invasion); United States v. Causby, 328 U.S. 256 (1946) (holding frequent flights of government airplanes over private property constitutes a physical invasion); Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904) (finding construction and operation of telegraph lines over a railroad’s right of way constitutes an invasion amounting to a compensable taking).


120. Id. at 423.

121. The New York State Commission on Cable Television had ruled that a “one-time $1 payment is the normal fee to which a landlord is entitled.” Id. The state legislature had attempted to “‘prohibit gouging and arbitrary action’ by ‘landlords [who] in many instances have imposed extremely onerous fees and conditions on cable access to their buildings.’” Id. at 444 n.3 (Blackmun, J., dissenting) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 194, 141, 423 N.E.2d 320, 326, 440 N.Y.S.2d 843, 851 (1981)).

122. As the Court noted, “The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. . . . [T]emporary limitations are subject to a more complex balancing process . . . .” Id. at 435 n.12.

123. Id. at 448 (Blackmun, J., dissenting).
The Court indicated that the rights to possess, control the use, and dispose of property had been trampled upon by the statutorily authorized permanent cable placement. Yet the Court sought to dispel any belief that the *Loretto* decision cast a shadow upon future governmental regulation of landlord-tenant relationships. The majority opinion asserted that only a third party's (i.e. the cable company's) permanent physical occupation of private property under the guise of regulation would amount to a per se taking. The Court admitted that the balancing test would ordinarily be applied with respect to housing-related enactments not involving permanent physical occupation.

What is the impact of *Loretto* upon condominium conversion regulations? Existing case law indicates that a balancing test will generally uphold such regulations. But is a different result likely to obtain under the physical occupancy test? Several more recent judicial decisions suggest that the physical occupancy test would yield the same result as the balancing test.

The *Loeterman* case was subsequently reconsidered in light of *Loretto*. On reconsideration, the district court did not view the protected tenant as analogous to the fixed structure in *Loretto*, because the tenant occupied the apartment prior to the owner's purchase of the building and the plaintiff landowner also was aware of the Ban Amendment upon purchase of the property. Realizing that the tenant's legal right to possess the unit on an extremely prolonged basis might strike the sensibilities of some as a "permanent physical occupation," the court observed that the occupation was not permanent due to the munici-

124. Justice Blackmun, in dissent, also argued that the Court's definition of permanence did not coincide with a true concept of permanence because the regulation only applies as long as the property is used for rental housing. *Id.* ("[T]he Court presumably describes a government intrusion that lasts forever. But as the Court itself concedes, [the statute] does not require appellant to permit cable installation forever, but only '[s]o long as the property remains residential and [the cable] company wishes to retain the installation.' . . . This is far from 'permanent.' ").

125. After citing prior decisions requiring landowner compliance with fire regulations, rent control, and housing emergency laws, the Court opined that "[s]o long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." *Id.* at 440.


ipality's ability to repeal the amendment, the tenant’s ability to vacate, or the eventual demise of the tenant.\textsuperscript{128}

\textit{Troy, Ltd. v. Renna},\textsuperscript{129} a decision considering the constitutionality of a New Jersey statute offering certain preconversion tenants an extended term of occupancy, adopted a similar argument.\textsuperscript{130} The Third Circuit distinguished the \textit{Loretto} requirement of permanent occupation by noting that most tenants offered long-term protection under the New Jersey statute were of advanced age. The court asserted that within this tenant group the regulatory enactment could not be viewed as authorizing permanent occupation. Like \textit{Loeterman}, the court argued that "the tenancies may terminate by virtue of changing income levels or principal residences, and tenants may be evicted on any of thirteen grounds."\textsuperscript{131} The \textit{Troy Ltd.} court also distinguished \textit{Loretto} as involving a taking for a "public use." Because the \textit{Troy Ltd.} court concluded that the Tenancy Act did not involve a "public use" of private property, a consideration of the taking argument was inappropriate.\textsuperscript{132}

The success of a plaintiff’s takings claim hinges upon proving that a regulation establishes a tenant’s permanent physical occupancy. It is difficult to prove such occupancy in most condominium conversion situations. Reference to a summary affirmation by the Supreme Judicial Court of Massachusetts in \textit{Fresh Pond

\begin{itemize}
  \item \textsuperscript{128} Id. at 2. The same federal district judge evidenced a contrary sentiment when ruling against the issuance of injunctive relief in Chan v. Town of Brookline, 484 F. Supp. 1283 (D. Mass. 1980). In Chan, the court acknowledged that the town’s Ban Amendment might “constitute [a] redistribution of [property]” such that “it amounts to a taking without compensation.” Id. at 1288. The court further acknowledged its awareness that an occupying tenant might voluntarily vacate, but argued that “this would restore the use to the plaintiffs by reason of an eventuality extraneous to the Amendment itself.” Id.
  \item \textsuperscript{129} 727 F.2d 287 (3d Cir. 1984); see Comment, Protecting the Elderly from Displacement by Condominium Conversions: Troy, Ltd. v. Renna, 30 WASH. U.J. URB. & CONTEMP. L. 275 (1986).
  \item \textsuperscript{130} In July 1981, the New Jersey legislature enacted the Senior Citizens and Disabled Protected Tenancy Act. N.J. REV. STAT. ANN. §§ 2A:18-61.22-.39 (West 1987). This Act provides to some elderly and disabled persons the right to remain as tenants in a converted unit for up to 40 years beyond any period authorized by other state statutes.
  \item \textsuperscript{131} \textit{Troy, Ltd.}, 727 F.2d at 301.
  \item \textsuperscript{132} The \textit{Troy Ltd.} court stated that the New Jersey Tenancy Act “did not put the plaintiffs’ property to public use, but rather regulated its use . . . .” Id. at 302. The court also noted that “[t]he installation at issue in \textit{Loretto} is the exemplar of a public use. The challenged New York law authorized an occupation of private property by a common carrier . . . .” Id. at 301.
\end{itemize}

The \textit{Troy Ltd.} court also ruled that the subject New Jersey legislation did not unconstitutionally impair contract rights between private parties. The court found the contract clause not to be a serious obstacle to state economic and social laws as affecting private contracts. \textit{Id.} at 295 (citing Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)). For a more detailed discussion of the contract clause, see L. TRIBE, \textit{supra} note 77, § 9-9.
Shopping Center, Inc. v. Rent Control Board supports this conclusion. In Fresh Pond, the plaintiff alleged that a Cambridge, Massachusetts ordinance authorized a residential tenant of the shopping center to remain indefinitely within a rental unit. The lower court ruled that no taking occurred and the Supreme Judicial Court of Massachusetts agreed. A single disserter to the dismissal of the appeal by the United States Supreme Court likened the tenant's presence to the permanency of the cable's placement in Loretto, but the Court declined to embrace this analogy.

133. 388 Mass. 1051, 446 N.E.2d 1060 (affirming the Superior Court by an equally divided court), appeal dismissed sub nom. Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983) (dismissing for lack of substantial federal question).

134. In Fresh Pond, a shopping center purchased a nearby apartment building with the intent of demolishing the building and utilizing the site as a parking area. Only one of the building's six units was occupied. But a local ordinance required the landowner to receive permission from the Cambridge Rent Control Board in order to remove the apartments from the rental market. When the Board denied the removal application, the landowner alleged that a 'taking' had occurred. An equally divided Massachusetts Supreme Judicial Court summarily affirmed a lower court holding that the restrictions were constitutional. Fresh Pond, 388 Mass. at 1051, 446 N.E.2d at 1060.

In order to determine the precise legal issues that the United States Supreme Court had summarily dismissed in Fresh Pond, the Court of Appeals for the Third Circuit in Troy Ltd. v. Renna, 727 F.2d 287, 303 (3d Cir. 1984), examined the jurisdictional statement filed in Fresh Pond:

[It appears that virtually the same taking issue was presented to the Court as is presented here. That question is whether the creation by state law of statutory tenancies after expiration of the tenants' leases amounts to a taking for which the state must provide compensation. The summary disposition of the appeal in Fresh Pond Shopping Center, Inc. binds this court.]

For a discussion of Troy Ltd., see supra notes 129-32 and accompanying text.

135. Justice Rehnquist, in dissent, observed that "[a]s in [Loretto], the power to end or terminate the physical invasion is under the control of a private party." Fresh Pond, 464 U.S. at 877 (Rehnquist, J., dissenting). He emphasized that there is no "foreseeable end to the emergency" housing conditions in Cambridge. Id. at 878. The local legislative assurance of a "fair net operating income to the landlord does not change the result . . . [W]e have recognized that property ownership carries with it a bundle of rights, including the right to 'possess, use and dispose of it.'" Id. The power under the ordinance to exclude a tenant from a rental unit is impermissible, because "[n]othing in the rent control provisions require the Board to compensate appellant for the loss of control over the use of its property." Id.

The Court of Appeals for the Ninth Circuit, impressed by the Fresh Pond dissenting argument, recently likened the presence of the occupying tenant to an unpermitted physical occupation of private property, therefore constituting a "taking." The Ninth Circuit panel determined that a Santa Barbara, California ordinance requiring mobile home park operators to offer leases of perpetual duration may also amount to a "taking" as defined by Loretto and the dissent in Fresh Pond. Hall v. City of Santa Barbara, 813 F.2d 198, 202-07 (9th Cir. 1987) (en banc) (reversing trial court's dismissal of case for failure to state an actionable claim and remanding to district court for further fact-finding), republished as corrected, 833 F.2d 1270 (9th Cir. 1986), petition for cert. filed, 56 U.S.L.W. 3134 (U.S. Aug. 6, 1987) (No. 87-220).
The Court's most recent pronouncement concerning *Loretto* appears in *Nollan v. California Coastal Commission*. In *Nollan*, the Court reviewed an administrative decision whereby the legal right to build a larger house on the subject site was conditioned upon the property owners agreeing to grant a public access way over a portion of their beachfront property. The majority opinion cites the *Loretto* decision as authority that an outright "appropriation of a public easement across a landowner's premises" would constitute a permanent physical occupation and taking. But the Court then questioned whether requiring the conveyance as a condition for issuing the building permit would alter the outcome. The Court ultimately held that there was a taking because the Coastal Commission's reasons for requiring the conveyance lacked the necessary nexus to the nature of the easement rights that were demanded.

It seems unlikely that the *Nollan* opinion will significantly affect the previously outlined judicial approach to determining the validity of condominium conversion regulations. The *Loretto* decision stresses that its holding is not intended to upset the government's long-standing power to adjust landlord-tenant affairs. Moreover, the *Fresh Pond* opinion seems to signal the Court's unwillingness to find a taking when a governmental regulation permits the tenant's long-term possession of an apartment. It would be surprising if the *Nollan* decision is interpreted as a means to cast aside established principles and provide a new avenue for successful challenges to conversion laws.

These decisions support the conclusion that even severely restrictive condominium conversion regulations will probably withstand constitutional attack. A state legislature, therefore, need not worry about avoiding constitutional pitfalls and should

---

137. Id. at 3145-46.
138. Id. at 3146.
139. "The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches." Id. at 3147.
140. The majority opinion notes:
It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house.

Id. at 3149.

fashion a condominium conversion law that directs appropriate attention to the needs of all concerned parties. The following proposed Model Act attempts to satisfy these criteria.

IV. A Model Act Governing Condominium Conversion

SECTION A. STATE PREEMPTION

It is the intent of the legislature to preempt the field of regulating the conversion of rental housing units to the condominium form of ownership. It is hereby declared that every county ordinance and every municipal ordinance or bylaw adopted prior to [insert effective date of statute] and relating to condominium conversion shall stand abrogated and unenforceable. No county, municipality, or consolidated county-municipal government shall have the power to adopt any ordinance relating to this subject on or after such effective date.\(^\text{142}\)

SECTION B. PREAMBLE

The legislature hereby finds and declares that the conversion of residential real estate from rental status to condominium ownership is an effective method of preserving, stabilizing, and improving neighborhoods and the supply of sound housing accommodations; that it is sound public policy to encourage such conversions while, at the same time, protecting tenants who do not desire or who are unable to purchase the units in which they reside from being coerced into vacating such units by reason of deterioration of services or otherwise or into purchasing such units under the threat of imminent eviction. The position of nonpurchasing tenants is worsened by a serious public emergency characterized by an acute shortage of housing accommodations. The position of nonpurchasing tenants who are sixty-two years of age or older is particularly precarious by reason of the limited finan-

\(^{142}\) The proposed provision is based upon the terminology of a Florida statute pre-empting local regulation of obscene literature. Fla. Stat. § 847.013(4) (1985).
cial resources of many such persons and the physical limitations of many such persons. Preventive action by the legislature in restricting rents and evictions during the process of conversion from rental to condominium status is imperative to assure that such conversions will not result in unjust, unreasonable, and oppressive rents and rental agreements affecting nonpurchasing tenants especially those who are sixty-two years of age or older. The necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination.\textsuperscript{143}

SECTION C. DEFINITIONS

(1) "Housing Accommodation" means any building, structure or part thereof or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, together with all services connected with the use or occupancy of such property, but \textit{not including} the following:

(a) housing accommodations in any hospital, convent, monastery, asylum, public institution, college, dormitory, and nursing or rest home for the aged;

(b) housing accommodations in hotels, motels, inns, tourist homes, and rooming and boarding houses that are occupied by transient guests for a period of fewer than fourteen consecutive days.\textsuperscript{144}

(2) "Condominium Conversion Eviction" means:

(a) An eviction, without just cause, of a tenant who was a resident of the housing accommodation at the time the Master Deed for the property wherein said housing accommodation is located was recorded pursuant to the provisions of \textit{insert the state condominium statute}. Such eviction does not include that of a tenant who is notified of the Master Deed recording and whose initial tenancy began after the recording of the Master Deed;

\textsuperscript{143} The proposed Model Act's preamble or legislative finding is drawn from parallel terminology in a relevant New York statute. Act approved July 20, 1982, ch. 555, § 1, 1982 N.Y. Laws 1474, 1474.

(b) An eviction of a tenant by a landlord where any presumption of condominium conversion eviction applies and the landlord has failed to overcome such presumption.145

(3) "Presumption of Condominium Conversion Eviction" arises if, within one hundred and eighty (180) days after a landlord terminates without cause a tenancy interest located in a housing accommodation, the landlord duly records a Master Deed for the building in which the housing accommodation is located and the then current tenant, if any, has received notice of the conversion, or a third party has received an offer of sale.146

(4) "Landlord" means the individual who holds title in any manner to any housing accommodation that is subject to this statute, including, but not limited to, a partnership, corporation, or trust.147

(5) "Tenant" means a person entitled to occupy a rental housing accommodation and who has signed a rental agreement or agreed to the terms of an oral lease. For purposes of this Act, a tenant may be an assignee of an interest under a written rental agreement

---

145. This subsection derives from Boston's conversion control regulations. Boston, Mass., Emergency Regulation 11: Condominium/Cooperative Notice and Eviction Regulation § 3(D)(2)-(3) (July 9, 1987). Regulation 11 was adopted "to implement the provisions and protections under" the city's condominium conversion ordinance. Id. § 1; see BOSTON, MASS., 10 ORDINANCES ch. 3 (1984).


146. This provision is partially borrowed from the Boston conversion regulations. The regulations establish additional presumptions of condominium conversion evictions when either (1) another tenant in the building receives a notice of conversion or (2) the landlord offers to sell condominium units to investors. Boston, Mass., Emergency Regulation 11: Condominium/Cooperative Notice and Eviction Regulation § 8(A)(1)(d)-(e) (July 9, 1987). The landlord may rebut the presumption of a condominium conversion eviction by establishing "just cause" for removal of the tenant or by demonstrating that the tenant voluntarily vacated the rental unit within the one hundred eighty (180) day period preceding the recording of the Master Deed. See infra note 157 and accompanying text.

147. This subsection derives from Boston, Mass., Emergency Regulation 11: Condominium/Cooperative Notice and Eviction Regulation § 3(N) (July 9, 1987). The proposed subsection omits the following sentence: "For purposes of this regulation, the rights and duties of the landlord hereunder shall be the obligation of anyone who manages, controls, or customarily accepts rent on behalf of the landlord." Id. This extension of the term seems likely to engender confusion when establishing responsibilities and liabilities of the landlord.
or an oral lease. A subtenant is not included within the definition.

(6) "Elderly Tenant" means a tenant who is sixty-two years of age or older on the date that notice of conversion is received, with a current annual income of less than $40,000148 or the surviving spouse of such a tenant if the tenant should die after the tenant receives notice of conversion and the surviving spouse is sixty-two years of age or older when the tenant dies, and the spouse's tenancy is subject to the terms of the deceased tenant's protected tenancy;149 provided that the building or structure has been the principal residence of the elderly tenant and the spouse for at least one year immediately preceding the receipt of notice of the conversion.

(7) "Handicapped Tenant" means a tenant with a current annual income of less than $40,000, who has an impairment that results from anatomical, physiological, or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, that are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and that are expected to be permanent and prevent the tenant from engaging in any substantial gainful employment on the date that notice of conversion is received; provided that the building or structure has been the principal residence of the handicapped tenant for at least one year immediately preceding the receipt of notice of conversion.150

(8) "Low Income Tenant" means a tenant with a current annual household income for the twelve months immediately preceding the receipt of notice of conversion that is less than seventy percent of the median income for the area set forth in regulations promulgated from time to time by the Department of Housing and

148. The District of Columbia also offers eviction protection to elderly tenants with an annual household income of less than $40,000, unless the landlord can establish an independent basis of eviction. D.C. Code Ann. § 45-1616(a) (1986); see also infra note 282.


150. This detailed provision is derived from the General Business Laws of New York State. N.Y. Gen. Bus. Law § 352-eeee(1)(g) (McKinney 1984). The Model Act's definition should be compared with the somewhat vague definition enacted by the Maryland legislature. See infra note 278.
Urban Development pursuant to 42 U.S.C. §§ 1437-1437r\textsuperscript{151} provided that the building or structure has been the principal residence of the low income tenant for at least one year immediately preceding the receipt of notice of conversion.

(9) "Master Deed" means any instruments and amendments that create a condominium according to the provisions of [insert the state condominium statute].\textsuperscript{152}

(10) "Tenant's Annual Income" means the total income from all sources during the last full calendar year for the tenant who resides in the housing accommodation at the time that notice of conversion is received.\textsuperscript{153}

**SECTION D. NOTICE OF CONDOMINIUM CONVERSION**

(1) If a landlord who converts a rental housing accommodation to a condominium, offers to transfer title to the rental housing accommodation, or acts without just cause and commences any action or performs any act or deed to recover possession of it from a tenant who resided in the housing accommodation when the Master Deed was duly recorded, then the landlord must comply with the following provisions:

(a) The landlord who converts a rental housing accommodation shall give notice of conversion to each tenant. The notice shall provide that each

\textsuperscript{151} Although a Massachusetts statute serves as a guideline for this provision, the Model Act has deleted a section of the Massachusetts law. The Massachusetts statute views a "low or moderate income tenant" as "a person or a group of persons residing in the same housing accommodation so long as the total income for all such tenants . . . is less than eighty percent of the median income for the area." Act approved Nov. 30, 1983, ch. 527, § 3, 1983 Mass. Acts 926, 928 (emphasis added). The Model Act is not designed to benefit apartment residents who do not qualify as tenants. See infra notes 230-33 and accompanying text.

\textsuperscript{152} It is a state condominium act, and not a state condominium conversion act, that will provide information concerning the necessary components of a Master Deed. The purpose of the Master Deed is to create a condominium. The document will contain a listing of unit boundary limitations, a schedule of common area percentage ownership interests, and other related topics. See CONDOMINIUM LAW AND PRACTICE, supra note 4, § 3.02; see also infra note 190.

\textsuperscript{153} The Model Act provision is a modified version of the relevant New Jersey statute. N.J. STAT. ANN. § 2A:18-61.24(c) (West 1987).
(b) At the same time a landlord gives notice of conversion to a tenant, the landlord must deliver a complete copy of the Model Act to the tenant.

(c) Whenever a landlord who converts a rental housing accommodation is required to give notice as provided for in this section, the period of notice shall not be less than the remaining term of any rental agreement that governs the use and occupancy of said housing accommodation or 365 days from the date the tenant of such housing accommodation is given said notice of intent, whichever is greater.

(d) If a tenant is elderly, handicapped, or low-income, then the term 730 days shall be inserted in place of the term 365 days as it appears in this section.

(2) Leases that expire during the notice period are automatically extended to the end of the notice period. The landlord may not alter any term of the rental agreement, except the annual rent. Any increase in the annual rent shall not exceed the percentage increase in the Consumer Price Index during the calendar year immediately preceding the date of notice of such rent increase.

(3) A rental agreement subject to a period of extension shall not be assigned, devised, subleased, or transferred by a tenant.

(4) No landlord shall bring any action seeking a condominium conversion eviction until the expiration of the notice period specified in this Act, except that a tenant may be required to vacate by reason of nonpayment of rent, commission of waste, or conduct that dis-

---

154. For example, the Uniform Condominium Act forbids any change of the rental terms during the extended period. UNIF. CONDOMINIUM ACT § 4-112(a) (1980).

155. This formula for determining a permissible rent increase is based upon the City of Boston's conversion ordinance. Boston, Mass., Emergency Regulation 11: Condominium/Cooperative Notice and Eviction Regulation § 4(F)(2) (July 9, 1987).

turbs other tenants' peaceful enjoyment of the premises.\textsuperscript{157}

(5) If a notice of conversion specifies a date by which a housing accommodation must be vacated, and otherwise complies with the provisions of \textit{[insert the state summary process statute]}, the notice provided under this section also constitutes a notice to vacate specified by that statute.\textsuperscript{158}

(6) Any notice or other materials required under this Act to be served upon a tenant by a landlord shall be served either personally upon the tenant or by leaving the notice or materials at the tenant's housing accommodation with some member of the tenant's family above the age of 14 years, or by certified mail; if the certified letter is not claimed, notice shall be sent by regular mail.

Any notice or other materials required under this Act to be served upon a landlord by a tenant shall be served either personally upon the landlord, or by leaving the notice or materials at the landlord's address with an employee of the landlord or a member of the landlord's family above the age of 14 years, or by certified mail; if the certified letter is not claimed, notice shall be sent by regular mail.\textsuperscript{159}

(7) Whenever a landlord who converts a rental housing accommodation is required to give notice as provided for in this section, the landlord shall additionally provide the tenant with written notice of the landlord's address for purposes of tenant service of notice or other materials upon the landlord.

\section*{SECTION E. TENANT RIGHT TO PURCHASE}

(1) Any tenant entitled to notice of conversion shall have an exclusive right to contract for the purchase of the housing accommodation that the tenant occupies on


\textsuperscript{159} Section D(6) of the Model Act is generally based upon a relevant New Jersey statutory provision. \textit{N.J. Stat. Ann. § 2A:18-61.2 (West 1987)}. 
the date of receiving notice of conversion, provided that the unit is to be retained without substantial alteration in the physical layout. The tenant may purchase the unit on the terms and conditions as set forth in a purchase and sale agreement duly executed by the landlord and accompanying the notice of conversion. Such tenant may exercise a right to contract to purchase such housing accommodation by executing and returning the purchase and sale agreement to the landlord prior to the expiration of thirty (30) days after receiving the purchase and sale agreement. The landlord must permit such tenant a period of one hundred and five (105) days following tenant's receipt of the proposed purchase and sale agreement in which to purchase the housing accommodation.

(2) If there is more than one tenant leasing a housing accommodation, then each such tenant shall be entitled to contract for the purchase of a proportionate share of the housing accommodation and of a proportionate share of any other tenant leasing that housing accommodation who elects not to purchase. In no case shall this provision be deemed to authorize the purchase of less than the entire interest in the unit to be conveyed.160

(3) The landlord's offer of sale to the tenant shall not require the tenant to pay a deposit exceeding five percent (5%) of the contract sale price. The landlord's offer of sale shall also inform the tenant that the tenant may include in the contract of sale a provision that limits damages for tenant's breach of contract to the amount of the deposit. Award of the deposit amount to the landlord will serve as the landlord's sole remedy for tenant's breach of contract, at law or equity. The landlord's offer of sale shall also inform the tenant that the tenant may include in the contract of sale a financing contingency provision.

The tenant's right to purchase is subject to terms and conditions that are substantially the same as or more favorable than those that the landlord offers to the

public for the period of seventy-five (75) days following the expiration of the tenant’s thirty (30) day exclusive period for contracting to purchase the unit.

(4) A tenant shall not assign, transfer, devise, or bequeath the exclusive right to contract for the purchase of the housing accommodation that the tenant occupies on the date of receiving notice of conversion. Nor shall a tenant assign, transfer, devise, or bequeath any rights arising under an executed contract of sale for such housing accommodation.

(5) A tenant’s exclusive right to contract for the purchase of the tenant’s housing accommodation terminates upon:

(a) written waiver of the right by the tenant, if the waiver is executed subsequent to the date upon which the tenant received the notice of conversion and the exclusive right to contract; or

(b) the expiration of the tenant’s thirty (30) day period within which the tenant may contract to purchase the unit.

In the event of written waiver under subsection (5)(a), a landlord shall not offer the housing accommodation for sale to the public prior to the expiration of thirty (30) days from the date upon which the tenant received notice of conversion and received the exclusive right to contract for the purchase of the tenant’s housing accommodation.161

SECTION F. TENANT RELOCATION COMPENSATION

(1) Any tenant who receives or is entitled to receive a condominium conversion eviction notice or who enters into a rental agreement subsequent to the landlord’s recording of a Master Deed without being notified of the intended conversion, and who chooses not to exercise the right to purchase pursuant to section E, or does not purchase another dwelling unit or units in the same building, shall upon vacating the housing accommodation within the appropriate notice period or any
extension thereof, receive from the landlord who converts the rental housing accommodation, a relocation expense allowance of $750 per housing accommodation.\(^{162}\)

(2) No tenant shall be eligible for such relocation expense allowance unless all rent due and payable for the unit under the rental agreement or extension of such agreement, if any, has been paid by the tenant prior to the date on which the housing accommodation is vacated. The landlord who converts the rental housing accommodation is not required to pay a relocation expense allowance to a tenant against whom the landlord has obtained a judgment for possession of the unit.\(^{163}\)

(3) The landlord who converts the rental housing accommodation must deposit the relocation expense allowance with the [insert name of designate municipal board or department] (a) within three (3) days of complete vacation of the housing accommodation by the tenant(s), or (b) no later than three (3) days prior to the conveyance of a tenant-occupied housing accommodation to a grantee other than the tenant, whichever occurs first. The landlord must pay by certified, cashier’s, or bank check payable to the order of the eligible tenant(s), and the landlord who converts the rental housing accommodation must simultaneously furnish the [insert name of designated municipal board or department] with the names of any tenant of the housing accommodation entitled to receipt of a relocation expense allowance. The expense allowance is payable to the tenant within six (6) days following the complete vacation of the housing accommodation by the tenant(s) and upon presentation of a statement signed by the landlord, or other acceptable proof, indicating that the housing accommodation is vacant.

(4) Where a rental unit is occupied by two or more co-tenants, any one of whom is a qualified tenant, each co-tenant of the unit shall be paid a pro rata share of

\(^{162}\) The latter portion of Paragraph (1) is based upon the relevant City of Boston ordinance. Boston, Mass., Emergency Regulation 11: Condominium/Cooperative Notice and Eviction Regulation § 4(F)(4)(a)(i) (July 9, 1987).

the relocation expense allowance in accordance with the provisions of section F(3). In no event shall the landlord who converts the rental housing accommodation be liable to pay a greater relocation expense allowance than that payable if the housing accommodation were occupied by one qualifying tenant. 164

(5) The relocation expense allowance shall be in addition to any damage, deposit, or other compensation or refund to which the tenant is otherwise entitled.

(6) If the tenant(s) fail to vacate the housing accommodation in accordance with the provisions of this Act, then the relocation expense allowance shall be returned to the landlord who deposited the allowance.

SECTION G. "SPECIAL TENANT" PROVISIONS

(1) Within thirty (30) days after receipt of the notice of conversion, any tenant who satisfies the requirements of an elderly, handicapped, or low income tenant (hereinafter special tenant) shall so notify the landlord and shall provide the landlord with written proof of eligibility. 165

(2) The protected tenancy status shall terminate immediately upon determination that:
   (a) the housing accommodation is no longer the principal residence of the special tenant;
   (b) the elderly or handicapped tenant’s annual income exceeds $40,000; or
   (c) the low income tenant’s annual income exceeds the limits prescribed by section C(8) above.

(3) Upon the termination of the protected tenancy status, the special tenant may be removed from the housing accommodation pursuant to [insert citation to state summary process statute], except that all notice and other times set forth therein shall be calculated

164. This subsection is drawn from the condominium conversion ordinance of Lakewood, Ohio. Lakewood, Ohio, Ordinance 73-80 (Nov. 3, 1980) (supplementing Chapter 1327 of the Building Code of the Codified Ordinances of the City of Lakewood.) The ordinance provision is reprinted in Note, supra note 160, at 128 n.142 (1981).

165. This provision derives from PA. STAT. ANN. tit. 68, § 3410(f) (Purdon Supp. 1987); accord CONN. GEN. STAT. ANN. § 47a-23c(d) (West Supp. 1987); MINN. STAT. § 515A.4-110(a) (1982). It is essential that the proposed Model Act provide that a landlord’s notice of condominium conversion to a special tenant must contain an explicit statement of the additional benefits offered to these tenants.
and extend from the date of the expiration or termination of any other period of tenancy authorized by this Act or the date of the expiration of the last lease entered into with the special tenant, whichever shall be later. 166

SECTION H. TENANT STATUTORY RIGHTS (ANTI-WAIVER PROVISION)

(1) Any provision in a rental agreement in which a tenant agrees to terminate or not renew a tenancy for other than good cause, or in which the tenant waives any other rights under this Act shall be deemed against public policy and unenforceable. 167

(2) It shall be unlawful for any person to engage in any course of conduct, including but not limited to interruption or discontinuance of essential services, which substantially interferes with or disturbs the comfort of any tenant's use or occupancy of the tenant's housing accommodation or related facilities.

(3) The district attorney or attorney general may apply to a court of competent jurisdiction for an order restraining conduct prohibited in this section. Nothing contained in this section shall preclude the tenant from applying on his or her own behalf for similar relief. 168

SECTION I. OVERSIGHT AUTHORITY, FILING, AND RECORDING REQUIREMENTS

(1) The state legislature shall designate county or municipal offices, departments, or agencies (hereinafter designated oversight authority) to be responsible for carrying out the provisions of this section. The state legislature shall promulgate such policies, rules, and regulations as will further the provisions of this section.

---

166. The bases for termination of protected tenancy status are drawn from the relevant New Jersey statute. N.J. STAT. ANN. § 2A:18-61.32 (West 1987).
167. The prohibition against a rental agreement containing a tenant waiver of rights is based upon New Jersey law. N.J. STAT. ANN. § 2A:18-61.4 (West 1987).
(2) Once a landlord who converts a rental housing accommodation has served a tenant with a notice of condominium conversion, a notice of terminating tenancy, a copy of the Model Act, and a binding purchase and sale agreement, all as provided for in this Act, the landlord shall file with the designated oversight authority an affidavit of service that shall include among other relevant information:

(a) the name and address of the tenant;
(b) the time and date of service to the tenant;
(c) the method of service upon the tenant as set forth in section D(6) of this Act;
(d) the name and current address of any tenant formerly residing in the rental housing accommodation and vacating the rental housing accommodation within a period of one hundred eighty (180) days prior to the recording of the Master Deed. The landlord must indicate the reason or circumstances surrounding the tenant’s removal from the housing accommodation; and
(e) a statement signed under the pains and penalties of perjury that the landlord has complied with the requirements of this Act pertaining to the service upon the tenant of all materials required under this Act. 169

(3) The landlord who converts a rental housing accommodation shall file, along with the affidavit of service, a copy of all materials served to the tenant within seven (7) days of service upon the tenant.

(4) Within three (3) days following receipt of the landlord’s affidavit of service, the designated oversight authority shall notify the tenant of the filing.

(5) The landlord who converts a rental housing accommodation shall file, with the designated oversight authority, any available written statement of the tenant indicating that the tenant’s purchase rights under section E(1) are freely released. Otherwise, the landlord shall file a written statement signed by the landlord under the pains and penalties of perjury stating that the time period provided for under this Act for

169. Section I(2) of the Model Act is based upon a parallel provision in the City of Boston’s conversion regulations. Boston, Mass., Emergency Regulation 11: Condominium/Cooperative Notice and Eviction Regulation § 5(G) (July 9, 1987).
tenant execution of the purchase and sale agreement expired without the tenant’s execution of the agreement.

(6) The landlord who converts a rental housing accommodation shall deliver to a prospective purchaser of the housing accommodation (other than the tenant) a copy of all written materials filed pursuant to this section. These materials shall be delivered at the time the landlord and prospective unit purchaser execute a purchase and sale agreement.

(7) A landlord who converts a rental housing accommodation shall pay the designated oversight authority a certification fee. The fee shall be applied to the cost of administering this section of the Act. The amount of the fee as well as collection and disbursement procedures shall be established by rules and regulations as provided for in subparagraph (1) of this section.

(8) If following a facial review as to the sufficiency of the materials filed by the landlord, the designated oversight authority determines that a landlord complied with the requirements of this section, the designated oversight authority shall issue the landlord a certificate of conversion compliance. Failure to comply with the requirements of this section will result in the denial of a certificate of conversion compliance.

(9) The Registry of Deeds for the county within which the condominium is located shall not accept for recording purposes the initial deed to a converted condominium unit unless a certificate of conversion compliance is also presented for recording. Any subsequent deed conveying title or an interest in a converted condominium unit shall refer to the location in the Registry of Deeds of the previously recorded certificate of conversion compliance.

(10) If a landlord who converts a rental housing accommodation in violation of section E conveys the housing accommodation to a purchaser for value who has no knowledge of the violation, recording both the deed conveying the housing accommodation and the certificate of conversion approval extinguishes any right a tenant may have under section E to purchase that housing accommodation, but does not affect the
right of a tenant to recover damages from the landlord who converts the rental housing accommodation.\(^{170}\)

### SECTION J. PENALTIES AND ENFORCEMENT

(1) Failure to comply substantially with the provisions of this Act may result in the initiation of criminal actions against any violator pursuant to Subparagraph (2) of this section. Other state and federal laws may also provide penalties for violations of the Act.

(2) Upon a criminal conviction for violation of the provisions of this Act, the offender shall be fined not less than $5000 or double the amount of gain from the transaction, whichever is larger, but not more than $50,000; or such person may be imprisoned for no more than six months; or both for each offense.\(^{171}\)

(3) A landlord who converts a rental housing accommodation and violates any provision of this Act shall be liable to any tenant injured by such violation in an amount equal to double the actual damages suffered or $5000, whichever is greater. A tenant who prevails in an action brought under this paragraph shall recover court costs and reasonable attorney fees.\(^{172}\)

(4) Prior to the conveyance of the converted condominium unit to a prospective purchaser, a tenant alleging a landlord's violation of the terms of this Act may bring an action for equitable relief, including specific performance. Following a conveyance as provided for in section I(10) of this Act, the tenant's sole remedy for such a violation shall be damages. In addition to any damages otherwise recoverable by law, the tenant shall be entitled to an amount equal to the difference between the price last offered in writing to the tenant pursuant to this Act and the price at which the unit was sold to a third party purchaser, plus court costs and reasonable attorney fees.\(^{173}\) If the landlord who converts the rental unit failed to offer a purchase opportunity to the tenant, then the court may establish a

---

170. See infra note 313.
171. See infra note 313.
172. See infra note 313 and accompanying text.
173. Section J(4) of the Model Act is based upon a relevant Florida statute. FLA. STAT. § 718.612(2) (1985).
reasonable selling price for purposes of determining
the amount of the tenant’s damage recovery.

(5) If a court determines that a unit purchaser had
actual knowledge of the landlord’s violation of the Act,
then the court may set aside the conveyance and order
the condominium unit conveyed to the tenant at the
price last offered in writing to the tenant. If the land­
lord who converts the rental unit failed to offer a
purchase opportunity to the tenant, the court may es­
tablish the terms and conditions, including unit price,
for the conveyance to the tenant. The tenant shall re­
cover court costs and reasonable attorney fees.

V. COMMENTARY ON THE MODEL ACT

State preemptive legislation, controlling the conversion of
rental housing to condominium ownership form, should ideally
respond to issues and policy concerns prompted by the conver­
sion process. The following commentary on the proposed Model
Act isolates and discusses various statutory provisions designed
to address these concerns.

The Model Act is more comprehensive than the existing Uni­
form Condominium Act that briefly highlights certain tenant-re­
lated issues arising from the conversion of apartment build­
ings.174 In discussing the various sections of the Model Act,
emphasis is directed toward the interrelationships among the
provisions.

A. Form of Enactment

When a state legislature enacts laws regulating the conversion
of rental housing units, the statute should be readily available to
all interested parties. For this reason, most legislative bodies
have incorporated conversion laws within their state’s existing
condominium statute.175 A legislature should avoid the unfortu­
nate practice of segregating the conversion legislation as a sepa­

174. UNIF. CONDOMINIUM ACT § 4-112 (1980). The Uniform Condominium Act dis­
cusses the tenant’s right to a 120-day notice period prior to vacating and the opportunity
to exercise a purchase right of first refusal regarding the converted rental unit. Id. § 4-
112 (a)-(b); see supra note 9.
175. E.g., CONN. GEN. STAT. ANN. § 47-282 (West Supp. 1985); ILL. ANN. STAT. ch. 30,
para. 330 (Smith-Hurd Supp. 1987); ME. REV. STAT. ANN. tit. 33, § 1604-111 (Supp. 1986);
rate act and not including it within the general laws of the state.\textsuperscript{176} The conversion act should also specifically refer to and cross-reference the earlier enacted statutes. For example, a state legislature may have previously established limitations upon a landlord's right of access to an occupied rental unit for purposes of showing the unit to a prospective purchaser. Although such regulation may be located within a state's landlord-tenant statutes, it should also be mentioned within a conversion act.\textsuperscript{177} The Model Act provides for such cross-references at appropriate places, though applications in each state will differ. Because this Article has argued that state legislation should govern condominium conversion and should preempt the possibility of local controls,\textsuperscript{178} the Model Act expressly states its preemptive effect in section A.

\textbf{B. Preamble or Statement of Purpose}

Few of the current condominium conversion statutes contain a preamble or introductory section. Although the police power serves as a legal basis for conversion control legislation,\textsuperscript{179} a state should list the various factors prompting legislative action. Otherwise, in the event of a challenge to the validity of the legislation, the underlying foundation for enactment must be gleaned from the less accessible legislative history of the statute.

Some legislatures may purposely avoid an explicit statement of the factual findings (e.g., a shortage of available rental housing) that resulted in adoption of the conversion regulations, due to a fear that the legislation may be easily overturned if it is


\textsuperscript{177} E.g., Mass. Gen. L. ch. 186, § 15B(1)(a) (1986) ("No lease relating to residential real property shall contain a provision that a lessor may, except to . . . show the same to a prospective . . . purchaser, . . . enter the premises before the termination date of such lease."). The Massachusetts Legislature failed to insert a parallel provision within the Commonwealth's condominium conversion statute. See supra note 176.

The Virginia legislature refers to the landlord's right of access in certain landlord and tenant statutes. See Va. Code Ann. § 55-248.18 (1986). It is also mentioned within the Commonwealth's condominium conversion statute. Id. § 55-79.94(6)(b) (Supp. 1987).

\textsuperscript{178} See supra notes 42-66 and accompanying text.

\textsuperscript{179} See supra notes 71-76 and accompanying text.
demonstrated at a future time that the conditions serving as justification for the act have been alleviated or removed. Another reason for failing to detail legislative findings or motivations may involve a belief that a definite date must then be established for termination of the legislation or at least a date specified for reviewing the basic factual premises. 180 These concerns diminish when compared with the benefits derived by the insertion of a preamble such as that set forth in section B. A preamble offers an attractive opportunity for a legislative statement announcing, at a minimum, that due consideration of identifiable affected interests preceded enactment of the conversion control laws. 181

C. Definitions and Subject Property

Most conversion statutes avoid a lengthy definitional section. This omission has produced confusion and uncertainty on how to interpret the statutory provisions. The legal heart of the Model Act rests within the statute's tenant protection package and enforcement mechanisms. The success of these measures depends upon all parties to the conversion process being fully apprised of personal rights and responsibilities arising under the legislation. A concise and unambiguous definitional section such as provided in section C aids in removing misunderstandings.

It is essential to define the roles of the various parties appearing within the condominium conversion scenario. These include the creator of the condominium project and the landlord. Although in many instances these labels will apply to the same individual, the distinction should be created by definition for cases where they are different. 182 The term "tenant" should also be plainly defined. Clarity regarding this definition will eliminate difficulty in determining the individuals entitled to the pro-

180. It is unnecessary for a legislature to establish a termination date for legislation so long as the law is reasonably related to the proper goal for which it was enacted. If the objective that motivated enactment has been satisfied or removed, the law must terminate. Newell v. Rent Bd., 378 Mass. 443, 448-49, 392 N.E.2d 837, 840 (1979) (validation of rent control regulations); Judson, supra note 4, at 211.

181. A preamble may indicate that a severe shortage of rental housing is further exacerbated by condominium conversions and that lower income and elderly tenants are most adversely affected by this process. Furthermore, a preamble may state that tenants should be informed of the benefits and disadvantages of conversion, and that the regulations are intended to bolster the public health, safety, and welfare. E.g., D.C. CODE ANN. § 45-1601 (1986); BOSTON, MASS., 10 ORDINANCES ch. 3 (Preamble) (1983).

182. See infra notes 201-06 and accompanying text.
tections of the Act. "Elderly tenant," "handicapped tenant," and "low or moderate income tenant" are additional classifications indicating policy preferences. "Condominium conversion eviction" is another phrase worthy of definition given the inevitable controversy concerning the reasons for a tenant's eviction. If an eviction relates to the condominium conversion process, then the tenant protection provisions of the act should be triggered. Defining those actions constituting a "condominium conversion eviction" may result in less confrontation between landlord and tenant.\textsuperscript{183}

The state legislature must also determine the nature of the property subject to the condominium conversion act. The legislature should tightly draft a provision noting the specific type of "housing accommodation" falling within the ambit of the legislation. Certain forms of housing such as dormitories, motels, or boarding houses are excluded by the Model Act. Short-term or transient occupants of such structures should not be offered extended terms of possession, purchase options, and other benefits of a state condominium conversion statute. More importantly, a legislature must decide whether all rental housing, regardless of the number of units within the structure, is to be covered by the state act. Some states exclude housing accommodations in buildings containing fewer than four housing accommodations\textsuperscript{184} or buildings having ten or less than ten dwelling units.\textsuperscript{185} These states offer no legislative explanation for this limitation; however, a lobbying effort by owners of smaller apartment buildings probably produced this result. A defense of such a limitation may be that structures containing a smaller number of rental units are often owner-occupied. Within this setting, the frequent interaction between owner and tenants may provide a climate more conducive to a conversion-minded owner who willingly and spontaneously offers tenant protections.\textsuperscript{186} When considering the exemption of smaller structures, however, a legislature should

\textsuperscript{183.} See infra notes 193-99 and accompanying text.


\textsuperscript{186.} A similar perception may result in a court upholding an exemption of owner-occupied two- and three-family dwellings from local rent control regulations. Marshal House, Inc. v. Rent Control Bd., 358 Mass. 686, 695, 266 N.E.2d 876, 883 (1971) ("Landlords who live with only a few tenants and have to get along with them on a day to day basis might well have been thought to be less likely to raise rents to an exorbitant level."); accord AMN, Inc. v. South Brunswick Township Rent Leveling Bd., 93 N.J. 518, 526-27, 461 A.2d 1138, 1142 (1983); Stamboulos v. McKee, 134 N.J. Super. 567, 572-74, 342 A.2d 529, 531-32 (App. Div. 1975).
realize that almost sixty percent of all rental units are located in structures containing fewer than five units. Section C(1) of the Model Act adopts the position that the term "housing accommodation" should not set adrift, without legislatively prescribed protections, those tenants residing in smaller buildings. But it excludes structures housing members of religious orders, students, or patients. Such individuals, given the special nature of their housing, should not be entitled to the benefits of a condominium conversion act.

D. Achieving Compliance with the Objectives of the Model Act

The Model Act rectifies a number of deficiencies in existing statutes. In one of their most glaring omissions, extant laws fail to set forth a means of determining which residential tenants fall under the protection of the conversion statute. If this issue is resolved, the rights, duties, and liabilities flowing from the legislative provisions may be more easily allocated to a particular condominium conversion project. Many current conversion control statutes afford strong protections to tenants confronted by a conversion plan. But the regulations engender confusion concerning when and to whom the protections must be offered.

Some owners of rental housing, lured by the potential profits of selling condominiums, may attempt by various methods to circumvent the requirements of state legislation. Although many legislatures have considered some of the issues arising in the condominium conversion setting, they generally fail to address effectively the problem of such "conversion act avoidance." This is particularly pervasive if owners believe that the regulatory burdens are too onerous. Faced with these perceived burdens, property owners may desire to terminate lessees’

187. See supra note 19 and accompanying text.
188. The lack of legislative attention concerning this issue extends to the Uniform Condominium Act. Although the Act defines a "conversion building" as "a building that at any time before creation of the condominium was occupied wholly or partially by persons other than purchasers and persons who occupy with the consent of purchasers," the protections of the Act seem only to focus upon those tenants occupying a converted unit when the declarant "intends to offer units" (i.e. after recording of the declaration creating the condominium). UNIF. CONDOMINIUM ACT §§ 1-103(8), 4-112(a) (1980) (emphasis added). Thus the Act does not deal with the developer's removal of tenants, prior to recording of the declaration, in order to avoid the Act's requirements.
189. The most extreme form of regulation appears to be a legislatively prescribed life tenancy, intended to benefit the occupant of a converted rental unit. Such a regulation
rental agreements, require tenants to vacate their units, and then convert the building. These approaches avoid the spirit of the various state acts; the Model Act devises legal barriers to this type of activity.

A condominium is usually created by the recording of a Declaration or a Master Deed. Merely stipulating that those tenants residing in rental units upon the date of document recording should be protected by the Act will not achieve the desired objective of thwarting avoidance of the Act. For instance, under such statutory terminology an owner could remove all tenants from their units in accordance with the terms of their rental agreements and then record the Master Deed. Perhaps fearful of this tactic, New Hampshire has required that:

No conversion subject to this chapter shall be effected until:
(a) The owner . . . has mailed to each tenant . . . a notice of intent to convert no earlier than 120 days before the date of filing an application for registration [under the state's condominium act].

Although this approach seems to achieve the objective of tenant notification, the owner apparently can still avoid the effect of this provision by terminating tenancies and removing all tenants no later than 120 days before creating the condominium. To combat such tactics, Massachusetts requires that an owner must comply with the condominium conversion act if "a building . . . has been used in whole or in part for residential purposes within one year prior to the recording of a master deed creating a condominium." Simply stated, this statute requires a building to be vacant for a minimum of one year prior to creating the condominium. This approach may also be criticized, because the law does not create a clear penalty if the owner violates the one-year rule. It also does not offer direction concerning the possible statutory rights of those tenants ordered to vacate their units during this one-year period. In one respect, the Massachusetts statute fosters a compelling need for compli-

was challenged and upheld in Loeterman v. Town of Brookline. For a discussion of this case, see supra notes 111-16, 126-28 and accompanying text.

190. A declaration "means any instruments, however denominated, that create a condominium, and any amendments to those instruments." UNIF. CONDOMINIUM ACT § 1-103(10) (1980). The term Master Deed is often used analogously. CONDOMINIUM LAW AND PRACTICE, supra note 4, §§ 3.02 n.9, 7.02[1].


ance because, except for property requiring significant rehabilitation, most apartment building owners cannot shoulder the loss of rental income associated with the requirement of leaving a building vacant for one year. But the significant legislative omissions concerning an owner's liability for a statutory violation and the rights, if any, of aggrieved tenants offset this positive aspect of the statute.

A comprehensive definition of a "condominium conversion eviction" such as given in section C(2) of the Model Act provides one method by which a legislature may better achieve owner compliance. By carefully defining this term, the statutory protections inuring to the benefit of tenants would more likely become a reality.

Section C(2)(a) of the Model Act expresses a legislative desire that a tenant, residing in a housing accommodation at the time that the Master Deed is recorded, should benefit from the statute if the landlord terminates the tenancy without cause. Most states have chosen to indicate that, in the context of a condominium conversion, a tenant may still be evicted for just cause.193

Note that under the Model Act neither a voluntary termination of tenancy by a tenant or the landlord's mere act of recording a Master Deed trigger application of the statute. A landlord should be entitled to record a Master Deed and be permitted to refrain from immediately offering the statute's protective benefits to a tenant residing in a unit on the date of recording. Statutes often require that when a landlord notifies a tenant of an impending conversion, the tenant should have the opportunity to purchase the unit in which the tenant resides.194 A landlord should not be forced to notify tenants and to sell units merely upon the recording of a Master Deed. The creation of a condominium on paper does not always signify a landlord's interest in immediately selling units. For example, co-owners of an apart-


Expansion of this term by use of examples would be helpful to landlords. One well-drafted statute indicates that a "for cause" termination would permit a landlord to evict a tenant and deny the protections of the conversion act if the tenant fails to pay rent due under the rental agreement, is so disruptive as to significantly infringe upon the quiet enjoyment of other residents, or continues after written notice to cease to violate substantially any of the landlord's rules and regulations governing the premises. N.J. Stat. Ann. § 2A:18-61.1 (West 1987); see also supra note 157 and accompanying text.

194. The "right of first refusal" is reviewed infra notes 234-54 and accompanying text.
ment building may desire a condominium format in order to separate ownership of units for purposes of obtaining cash through refinancing. Also, a Master Deed may be recorded for the purpose of achieving protective status from any subsequently enacted conversion controls. 195

A desirable consequence of Section C(2)(a) of the Model Act is that a tenancy created after the recording of the Master Deed is not subject to the statute if the incoming tenant is notified of the conversion prior to entering into a rental agreement. Here the incoming tenant cannot object to a future relocation due to an unexpected condominium conversion; however, such a tenancy should only be terminated in accordance with the lease terms and any relevant landlord-tenant regulations. But the Model Act as presented in section C(2)(a) fails to consider the consequences of a landlord's attempt to remove tenants prior to the recording of a Master Deed.

Section C(2)(b) of the Model Act anticipates a landlord-initiated action to evacuate a rental unit in contemplation of converting the building. Listing a series of scenarios that would raise a presumption of condominium conversion eviction defends effectively against such improper tactics. To allow a fair degree of landlord flexibility and simultaneously guard against a landlord abusing the process, a legal presumption anticipates that there will be instances when the landlord is justified in evicting a tenant and can thereby rebut the presumption. 196

Section C(3) establishes such a presumption. The legislatively crafted presumption of condominium conversion eviction is desirable for several reasons. First, the sole act of recording a Master Deed should not serve as a point of reference for automatic application of the act. 197 Under the Model Act, a landlord may terminate a tenancy in accordance with rental agreement terms, 198 then record a Master Deed within 180 days of terminating the tenancy and avoid liability for violating the Act. But if a landlord follows these steps and, within the original 180 day span, either (a) subsequently rents the unit and provides the

195. These and additional underlying motivations are presented in Graff, Minnesota Uniform Condominium Act: The View of Developers' Counsel, 10 WM. MITCHELL L. REV. 71, 82 (1984).
196. See supra notes 157, 193 and accompanying text.
197. See Model Act § D(1), supra Part IV; supra notes 145-46 and accompanying text; infra notes 216-17 and accompanying text.
198. It should be reiterated that the landlord is not terminating the tenancy due to a tenant's violation of the rental agreement. To the contrary, a landlord is either awaiting the natural expiration of the tenant's term (i.e., an estate for years), or terminating the tenancy with proper notice (i.e., a periodic tenancy or a tenancy at will).
new tenant with notice of conversion or (b) offers the unit for sale to a third party, then the original tenant is deemed ousted due to a condominium conversion eviction. Although a landlord choosing option (a) may technically be complying with the Act by giving notice to a tenant residing in the unit when the Master Deed was recorded, the Model Act establishes that the rights of the ousted tenant have been infringed and that this injury must be compensated. 199

The preceding discussion demonstrates that tightly-drafted and unambiguous provisions will aid in assuring that a landlord adheres to the conversion act's mandates. But it is fanciful to imagine that well-defined terminology will resolve all difficulties. The definitional section of a statute must be complemented by a strong oversight and enforcement mechanism. 200

E. Rights, Duties, and Liabilities Under the Act

The Model Act attempts to blend substantive and procedural requirements to achieve an equitable resolution of the tenant-related issues associated with the conversion of a multifamily rental structure. The label "tenant protection package" is an appropriate sobriquet for this aspect of the Model Act.

1. Notice: Landlord and tenant— Too many state statutes plunge quickly into a recitation of protections afforded to tenants affected by condominium conversions without identifying clearly the individuals upon whom the task of notification falls. Moreover, uncertainty surrounds the selection of those residential occupants entitled to the benefits of the statute. Protection means little if it is unclear who is to be protected.

Existing conversion laws also often define terms such as owner, 201 developer, 202 and tenant, 203 in a confusing and overlap-

199. See infra notes 312-13 and accompanying text.

200. See infra notes 309-14 and accompanying text for a discussion of oversight and enforcement under the Model Act.

201. In the District of Columbia, an owner is "an individual, corporation, association, joint venture, business entity and its respective agents, who hold title to the housing accommodations unit." D.C. Code Ann. § 45-1603(14) (1986). An "owner" in the District of Columbia could be the developer converting the apartment building or a market purchaser of a condominium unit. Although the Massachusetts conversion statute consistently refers to an "owner," the term is undefined. Apparently, the Massachusetts legislature views an "owner" for purposes of the conversion statute as the converter of the structure and not a market purchaser. Act approved Nov. 30, 1983, ch. 527, § 4(b), 1983 Mass. Acts 926, 930 ("[a]ny owner of residential property who converts such property") (emphasis added).
ping manner. A legislature should fashion the exact nature of a desired tenant benefit and then fully define those terms that are necessary to assure that the benefit is transmitted. Because tenant notification is imperative, the responsibility for giving notice should be assigned to the person initiating the conversion project. The owner of rental property creates a condominium by recording a Master Deed. The owner or declarant also serves as the landlord of the rental property. Established definitions of a declarant may be overly broad for purposes of the conversion acts. Therefore, the landlord, as defined by section C(4) of the Model Act, seems the proper party to fulfill the duty of notifying tenants.

Because all tenant notification requirements under the Model Act must be fulfilled before a third party receives title to the condominium, the Model Act does not seek to impose such a duty, or accompanying liability for violation thereof, upon a third party. Accordingly, the burden of complying with statutory tenant notification requirements falls upon the landlord who converts rental property to a condominium form of ownership. If a landlord or converter attempts to convey either the entire structure or an individual unit to a third party grantee, the transaction may be invalidated if the tenant notification requirements have not been fulfilled. By premising a valid unit title

---

202. Maryland defines a “developer” as a “person who subjects his property to the condominium regime established by this title.” MD. REAL PROP. CODE ANN. § 11-101(g) (Supp. 1987). But if a “developer” sells the apartment building to a purchaser, is the purchaser also a “developer”? The Illinois statute defines the term as a person “who offers units legally or equitably owned by him for sale in the ordinary course of his business, including any successor or successors to such developers’ entire interest in the property other than the purchaser of an individual unit.” ILL. ANN. STAT. ch. 30, para. 302(q) (Smith-Hurd Supp. 1987).

203. In the District of Columbia, a “tenant” means a “tenant, subtenant, lessee, sublessee, or other person entitled to the possession, occupancy or benefits of a rental unit within a housing accommodation.” D.C. CODE ANN. § 45-1603(17) (1986). Many conversion statutes repeatedly use the undefined term “tenant.” The definitional section of the Uniform Condominium Act also reflects this omission. UNIF. CONDOMINIUM ACT § 1-103 (1980).

204. UNIF. CONDOMINIUM ACT § 1-103(9) (1980) (providing an alternative, part (iii), for interested jurisdictions):

“Declarant” means any person or group of persons acting in concert who (i) as part of a common promotional plan, offers to dispose of his or its interest in a unit not previously disposed of, [or] (ii) reserves or succeeds to any special declarant right, [or] (iii) applies for registration of a condominium under Article 5.

Parts (i) and (iii) are relevant for determining the individual(s) responsible for offering tenant protections under a conversion statute, but Part (ii) does not directly concern tenants’ rights issues.

205. See infra notes 309-14 and accompanying text; see also Model Act § J, supra Part IV.
transfer upon prior satisfaction of the Model Act’s tenant-related requirements, a true third party grantee or devisee will be free from notification requirements. But in the event that a tenant is still residing in a converted condominium unit after the title has validly transferred to a third party, the new owner will be deemed a landlord for other purposes of the Model Act or relevant statutes and ordinances.

Section C(5) defines a tenant for purposes of the Model Act. An intentionally narrow classification that may not include all individuals occupying a rental unit, this definition applies to those occupants obligated to the landlord under a written or oral rental agreement. This restricted definition is preferable because only those individuals with a significant possessory interest should receive notification of conversion, an opportunity to purchase their unit, and the other benefits conferred under the Model Act.

2. Notice: Method of notification—The section D(6) requirement of tenant notification accomplishes the dual functions of alerting a tenant to the conversion effort and setting forth a tenant’s rights and duties under the statute. State legislation generally provides for notification consisting of the intrinsically unreliable practice of hand delivery to a unit or notice by mail. A more refined process, such as found in New Jersey, would provide greater likelihood that the notice would actually be received. Section D(6) of the Model Act adopts the New Jersey legislative format that sets forth several acceptable methods, including: personal service, leaving a copy at the tenant’s

206. See infra text accompanying notes 305-08, 314.
207. See infra notes 250-33 and accompanying text for a fuller discussion of notification of subtenants. See also Belmont East Co. v. Abrams, 123 Misc. 2d 404, 408, 473 N.Y.S.2d 676, 679 (Sup. Ct. 1984) (determining that a “tenant” for purposes of a cooperative conversion plan “is the person named in the lease and who pays the rent, even when a spouse or other member of the family is in residence”).

A Connecticut decision established that a statute requiring a tenant to receive “hand-delivery” of a notice of condominium conversion means that delivery must be “made personally to each tenant” and not “hand-delivered to the unit.” Glenn Chaffer, Inc. v. Kennedy, 37 Conn. Supp. 654, 656, 433 A.2d 1018, 1020 (Super. Ct. 1981).

In Greene v. Lindsey, 456 U.S. 444, 453-54 (1982), the United States Supreme Court held a state statute violated due process by permitting service of process for eviction purposes to be made by posting a summons on the tenant’s apartment door. The Court ruled that the statute violated the tenant’s due process rights guaranteed by the fourteenth amendment.

usual place of abode with a member of the tenant's family, or use of certified mail. If the certified letter is not claimed, notice must be sent by regular mail.\textsuperscript{210}

In some instances, the Model Act requires a tenant to notify a landlord. Section G provides that elderly, handicapped, and low income tenants may be entitled to special legislative benefits. In order to be a member of the "special tenant" category, a tenant must notify the landlord of such eligibility.\textsuperscript{211} A simple and direct method should also be adopted for this purpose. The Model Act provides that the tenant may serve written notice by personal service, leaving a copy at the landlord's address with an employee or family member, or by mailing.\textsuperscript{212}

3. \textit{When a landlord must provide notice of conversion—}

Various state statutes dealing with condominium conversion require a landlord to provide a tenant with "notice of intent to convert."\textsuperscript{213} Such vague terminology raises uncertainties as to the need to notify tenants if the landlord is merely contemplating a condominium conversion. This problem may be avoided by statutorily requiring a landlord to provide "notice of conversion."\textsuperscript{214} Because legislation can stipulate that notice of conversion cannot be delivered until the recording of a Master Deed, the landlord avoids any liability for failing to notify tenants while conversion plans remain at the incubation stage.\textsuperscript{215}

\begin{enumerate}
\item \textsuperscript{210} \textit{Id.}
\item \textsuperscript{211} \textit{See Model Act § G(1), supra Part IV.}
\item \textsuperscript{212} \textit{See Model Act § D(6), supra Part IV.}
\item \textsuperscript{213} \textit{E.g., Minn. Stat. § 515A.4-110(a) (1982) ("A declarant . . . shall give . . . notice of . . . the intent to convert . . . .") (emphasis added); N.J. Stat. Ann. § 2A:18-61.8 (West 1987) ("Any owner who intends to convert a multiple dwelling . . . shall give the tenants 60 days' notice of his intention to convert . . . .").}
\item \textsuperscript{214} \textit{E.g., Unif. Condominium Act § 4-112(a) (1980) ("A declarant of a condominium . . . shall give each of the residential tenants . . . notice of the conversion . . . .").}
\end{enumerate}

A legislature should stipulate that notice of conversion may be delivered to a tenant only after recording of the Master Deed or Declaration. Without such a requirement, a court may not demand adherence to this practice. For example, in River Park Tenants Association v. 3600 Venture, 534 F. Supp. 45, 50-51 (E.D. Pa. 1981), tenants alleged landlord's failure to comply with the statute when he delivered conversion notice prior to recording the condominium constituent documents. The court ruled that statutory terminology does not prevent such action.
Under the Model Act, the required tenant notification consists of far more than an announcement that a tenant may soon be residing in a rental unit under condominium ownership. The message would also provide a tenant with a purchase right of first refusal, the possibilities of an extended term of occupancy, and an award of relocation compensation. The creation of a condominium should not necessarily entitle tenants automatically to the benefits of the Act.\textsuperscript{216} Recording the Master Deed does not change the status of preconversion tenants. Requiring a landlord who converts a rental apartment building to offer immediately an extended lease term or a purchase option would be inequitable. For these reasons, the Model Act does not offer tenant benefits upon recording of the Master Deed.

The Model Act demands notification of conversion and the attendant tenant benefits when the landlord who converts the building desires to recover possession of a condominium rental unit from a tenant or convey title to a tenant's unit.\textsuperscript{217} Some state statutes favoring this approach confuse the issue by requiring tenant notification when the landlord desires to reclaim the unit (after the recording of the constituent documents) and by appearing uncertain about the possible collateral duty to notify subject tenants at the time of document recording.\textsuperscript{218} This is troublesome because the converting landlord should not be forced to provide notice of conversion when the constituent documents are recorded. Furthermore, those tenants residing at the time of Master Deed recording may no longer be occupying units at the time recovery of possession is sought.

Section D(1) of the Model Act resolves this problem by protecting tenants who would otherwise be dispossessed as a result

\textsuperscript{216} See \textit{supra} notes 145-46 and accompanying text for a discussion of this point in the context of condominium conversion eviction.

\textsuperscript{217} It is possible that a landlord, after recording the Master Deed may convey the entire apartment building to a purchaser. Although no effort may have been initiated to remove any tenants, the title to individual units has been transferred. Each tenant should have been notified of the conversion prior to the sale, because section E of the Model Act requires that a tenant be offered a purchase right of first refusal. See \textit{infra} notes 234-53 and accompanying text. In contrast, a newspaper advertisement announcing the availability of condominiums, but not citing unit selling prices, does not trigger tenant benefits under Pennsylvania's conversion act. Touraine Partners v. Kelly, 333 Pa. Super. 196, 482 A.2d 240 (1984).

\textsuperscript{218} For example, the Massachusetts conversion statute indicates that notice must be delivered to tenants \textit{after} the Master Deed is recorded. But the statute further stipulates that the notice shall state that "the owner has filed or intends to file a master deed . . . ." Act approved Nov. 30, 1983, ch. 527, § 4(a), 4(a)(i), 1983 Mass. Acts 926, 929. Thus, whether the recording of a Master Deed immediately awards certain benefits to tenants is unclear.
of an unanticipated conversion. The protected class does not include those individuals who are tenants when the Master Deed is recorded and then voluntarily vacate prior to receiving notice of conversion or those tenants aware of the conversion program who entered into rental agreements subsequent to the recording of documents creating the condominium.

A landlord who converts rental units should not always be foreclosed from evicting tenants otherwise entitled to notice of condominium conversion. Section D(4) of the Model Act stipulates that a tenant may be required to vacate the rental unit for failure to pay rent, commission of waste, or unacceptable conduct.

The section D(1) reference to "just cause" provides the key to a landlord rightfully removing a tenant after recording of the Master Deed and prior to giving notice of conversion to the tenant. But the term should be defined to exclude an attempt by a landlord, subsequent to Master Deed recording, to recover a rental unit when the only basis for recovery is the natural expiration of the tenant's term. Upon expiration of the tenant's rental agreement, the Model Act confronts the landlord with the options of serving notice of conversion and its accompanying benefits or offering the tenant the right to remain in possession as a periodic tenant.219 The terms of the expired rental agreement continue to control, except that section D(2) of the Model Act places a ceiling on the percentage of permissible rental increase.220 Without this ceiling, the landlord might compel a tenant to vacate the unit by establishing a high rental charge. On the other hand, section D(3) prohibits the tenant from assigning or subletting the tenancy interest during this period.

Without this "just cause" language of section D(1), a landlord could easily avoid giving notice of conversion to a tenant residing in a unit when the Master Deed was recorded. Because many residential rental agreements are on a month to month or year to year basis, the landlord could terminate the lease on the next appropriate date following the Master Deed recording and remove the tenant. Section D heightens the probability that a tenant, residing in a rental housing accommodation when the Master Deed is recorded, will receive notice of conversion. Such

219. A periodic estate is a tenancy that will continue for a year or a fraction of a year and for successive similar periods unless terminated by either party by proper notice. The most common types of periodic tenancies are those operating from year to year and from month to month. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 65 (2d ed. 1988).

220. See supra note 155 and accompanying text.
notice is not required if the tenant voluntarily vacates or provides the landlord with "just cause" for eviction.

4. Notification of the tenant—The possibility of an extended possessory term—Notification alerting tenants of an impending conversion project is the most frequent protection offered by state and local governments. The Model Act requires a landlord to provide notice of conversion to a tenant residing within an apartment when the Master Deed is recorded, if the landlord is seeking removal of the tenant absent just cause. The suggested form of tenant notification requires that the landlord who converts rental property to a condominium form of ownership must inform an appropriate tenant of an opportunity for continued residence within the unit, thereby supplying time for the tenant to evaluate future residential plans. The notice periods mandated by current state statutes range from unrealistically brief to overly lengthy terms; the most common term being 120 days. Under section D(1)(c) of the Model Act, if the termination date of the tenant's existing rental agreement exceeds the notification period, then the tenant would be entitled to possess the housing accommodation until the later date. Legislation should clearly set forth the right of a tenant to remain in possession in this instance. The Model Act's section D(1)(c) also illustrates that the tenant's residency may be extended beyond the termination date of the lease when the required period of notice prior to eviction causes an overlap.

The common legislative approach permitting the extended occupancy of a tenant for a maximum period of 120 days does not appear to be an unreasonable burden upon the property owner, particularly when certain states and communities have extended this period to one year, three years, and up to a life ten-

---

221. 1980 HUD STUDY, supra note 3, at XI-4, XII-8.
222. For example, TENN. CODE ANN. § 66-27-123 (1982) allows tenants only two months actual notice of the conversion.
223. 1980 HUD STUDY, supra note 3, at XI-4; e.g., UNIF. CONDOMINIUM ACT § 4-112(a) (1980).
224. The following provision highlights this protection: the tenant shall have "[t]he right to remain in the unit of residence for 120 days after receipt of this notice, or until expiration of the term of the lease, whichever is longer." Mich. Comp. Laws Ann. § 559.204(2)(c) (West Supp. 1987); accord PA. STAT. ANN. tit. 68, § 3410(e)(1) (Purdon Supp. 1987); UNIF. CONDOMINIUM ACT § 4-112(e) (1980).
If a landlord and tenant enter into a new rental agreement after the expiration of the tenant's one-year notice period, the landlord is not required to give a second one-year notice to the tenant. Bernstein v. Towne Estates, Inc. 18 Mass. App. Ct. 907, 462 N.E.2d 1136 (1984).
Any protection beyond a term of one year appears to be extreme and may well curtail conversion efforts. An exception should be made for certain individuals, such as the elderly, the handicapped, and those with low income, who may require additional time to reach conclusions concerning their decision to purchase or to relocate. Extended notification or pre-eviction periods that benefit these groups may therefore be desirable.

From the tenant's viewpoint, a notification requirement is the most basic conversion protection. This concept parallels existing safeguards in the landlord-tenant field. A 120-day notice period seems inadequate, particularly in a restricted rental market or at a time of high inflation. A one-year notice would appear to be better designed to protect most affected tenants.

Section D of the Model Act attempts to insure that a tenant is guaranteed a minimum period of one year before being required to vacate, unless the tenant provides the landlord with cause justifying termination of the tenancy. The Model Act prevents a tenant from transferring the benefit of a statutorily extended term and permits a landlord's notice of conversion to serve as a notice to vacate upon the expiration of the rental agreement or the notice period, whichever is longer. Moreover, it allows conveyance of a housing accommodation to a third party while the tenant is in possession of the unit. But the opening of section D(4), "no landlord shall bring any action," prevents both landlords who convert rental units and market purchaser landlords from evicting tenants at a premature date.

The Model Act's proposed definition of a tenant does not include a subtenant, though the Uniform Condominium Act requires notification of such individuals. Requiring notification of subtenants would be counterproductive because it raises issues concerning a subtenant's right to an extended term and other benefits stipulated by the Model Act. Also, a subtenant

226. N.J. STAT. ANN. § 2A:18-61.1(k) (West 1987) (three year notice period must be provided when "[t]he landlord . . . of the building . . . is converting from the rental market to a condominium . . . of two or more dwelling units . . . ."); see also N.J. STAT. ANN. § 2A:18-61.2(g) (West 1987).


228. For a discussion of "special tenant" provisions of section G of the Model Act, see infra notes 268-97 and accompanying text.

229. The notice period as established by a conversion statute may effectively extend a tenant's lease term while other statutes, wholly unrelated to the condominium conversion process, may offer similar protections.

230. See Model Act § C(5), supra Part IV; see also supra text accompanying note 207.

231. UNIF. CONDOMINIUM ACT § 4-112(a) (1980).
acquires an interest in the housing accommodation through an agreement with a tenant. The legislature should not attempt to interfere with this preexisting contractual relationship. Because the nature of a sublease\(^\text{232}\) contemplates a sublessor retaining a reversionary interest, the Model Act names only the original tenant or an assignee\(^\text{233}\) of the original tenant as beneficiary.

5. Tenant right to purchase—A “right of first refusal” requires a landlord to offer the first opportunity of unit purchase to the tenant occupant. The exclusive option generally lasts from 60 to 120 days.\(^\text{234}\) As current occupants, preconversion tenants often desire to remain in possession and to purchase their units. In an apparent attempt to discourage a landlord from demanding an unreasonable selling price in light of a tenant’s desire to purchase, state regulations often require landlords to refrain from offering the unit on more favorable terms to others for a certain period following the expiration of the tenant’s exclusive purchase option.\(^\text{235}\) Conversely, many landlords interested in securing tenant purchasers will often offer a discounted selling price to tenants as an incentive to purchase.\(^\text{236}\) A high proportion of tenant purchasers, even at discounted rates, may benefit the developer. Tenant purchases may help the landlord to secure financing contingent on pre-sale requirements, to shorten the time period needed for conversion, and to aid in repaying any interim loans associated with the conversion.\(^\text{237}\) The purchase of units by satisfied tenants also serves as advertising for the converter. The Model Act therefore establishes a tenant purchase option, but also anticipates likely problems or issues raised by the requirement of such a right. Many current state statutes direct only cursory attention toward this topic.

Although statutes almost uniformly require that a tenant receive the right of first refusal contemporaneously with the notice

\(^{232}\) In a sublease, the original tenant becomes the landlord of the transferee-subtenant. 1 AMERICAN LAW OF PROPERTY § 3.57 (A. Casner ed. 1952).

\(^{233}\) “If the transfer is of all of the lessee’s interest in the whole of the leased premises, it is referred to as an assignment.” Id. § 3.56, at 294.

\(^{234}\) E.g., ILL. ANN. STAT. ch. 30, para. 330 (Smith-Hurd Supp. 1987) (120 days); Wis. STAT. ANN. § 703.08(1) (West 1981) (60 days); Act approved Nov. 30, 1983, ch. 527, § 4(b), 1983 Mass. Acts 926, 930 (90 days); UNIF. CONDOMINIUM ACT § 4-112(b) (1980) (60 days).

\(^{235}\) E.g., UNIF. CONDOMINIUM ACT § 4-112(b) (1980) (If a tenant does not purchase the subject unit during the option period, “the offeror may not offer to dispose of an interest in that unit during the following [180] days at a price or on terms more favorable to the offeree than the price or terms offered to the tenant.”).

\(^{236}\) The discounts generally range from 10% to 20% of the purchase price. 1980 HUD STUDY, supra note 3, at IX-2; see infra note 251.

\(^{237}\) 1980 HUD STUDY, supra note 3, at III-19.
of conversion, an issue arises concerning whether a landlord must notify and offer a purchase option to all tenants simultaneously. Existing state legislation does not offer a definitive answer. The Model Act adopts the position that a landlord should not be compelled to provide notice of the condominium conversion and to offer purchase rights to all tenants at the same time. A landlord should be allowed to determine the marketing schedule of the various units. Once the landlord decides to remove a tenant from a rental unit or to offer the unit for sale, and if the appropriate tenant still resides in the unit to be sold, then the tenant is entitled to notice of conversion and a right of first refusal.

One state statute requires the offer of a purchase option only to tenants who have resided in a rental unit for a minimum period. Under the Model Act, any tenant residing in a rental unit at the time of Master Deed recording qualifies as a beneficiary, regardless of length of residency. Another form of state regulation allows a landlord to avoid offering a right of first refusal if the postconversion boundaries of a tenant's rental unit substantially differ from the dimensions prior to conversion.

Under these circumstances, a duty to offer a purchase opportunity to a tenant would be impractical if an apartment has been subdivided or several apartments have been merged. Section E of the Model Act takes account of this problem not by requiring a right of first refusal, but by providing that a tenant of such unit receive notice of conversion and the opportunity for an extended tenancy.

The Model Act's mandated interim period between a tenant's execution of the purchase contract and the actual conveyance, provided in section E(1), is designed to permit a reasonable time period for a tenant to ascertain the quality of title, secure fi-

238. See supra note 217 and accompanying text.

Section E of the Model Act prevents a landlord from selling converted units to investors while asserting that the tenants will have an opportunity to purchase their units from the investors. The landlord must offer to sell the unit directly to a tenant. The Model Act is thus designed to prevent landlords from circumventing condominium conversion legislation, see Wells, The Correian War, Boston Tab, Jan. 7, 1986, at 1, col. 4; Snyder, Ad Launches a Condo Case, Boston Globe, Aug. 20, 1985, at 1, col. 1. A Pennsylvania court has ruled that a newspaper advertisement that merely announces the availability of condominiums but does not quote unit selling prices does not entitle a tenant to receive notice of conversion. Touraine Partners v. Kelly, 333 Pa. Super. 196, 482 A.2d 240 (1984).


240. E.g., Unif. Condominium Act § 4-112(b) (1980).
nancing, and other tasks. In addition, by legislatively estab-
lishing the purchase right of co-lessees, it is possible to avoid litiga-
tion wherein each lessee asserts an exclusive right to purchase
the converted unit. 241

Sections E(1) and (2) emphasize that the purchase option ap-
plies solely to the housing accommodation occupied by the ten-
ant, and only if the rental unit substantially conforms to the
unit dimensions prior to conversion. Section E(1) also draws a
distinction between a tenant who exercises an option to
purchase and a tenant who actually purchases the unit. The
Model Act requires a reasonable period of time for completion of
both events. Most conversion statutes do not make such a dis-
tinction. Too often they leave landlords and tenants uncertain as
to whether the time period established by statute refers to the
expiration date for executing the purchase and sale agreement or
to the final date for actually acquiring title. 242

Existing state legislation also fails to consider the relationship
between the purchase option and the reality that co-tenants may
reside in a rental unit. Occupancy of an apartment by more than
one tenant should not disadvantage a purchase opportunity. In-
stead, each co-tenant should receive an option to purchase a
proportional share of the unit. Certain apartment occupants,
however, may not be "tenants" as defined by section C(5) of the
Model Act. These individuals are not the intended recipients of
a purchase option.

For all tenants entitled to a purchase right of first refusal, the
contents of the condominium contract of sale agreement are of
prime importance. To compel landlords to offer a viable
purchase opportunity to tenants, certain provisions of the agree-
ment must be regulated. Unless some of these terms are regu-
lated by statute, a landlord may effectively nullify a tenant's
right of first refusal by requiring an unreasonably high down

co-lessees only had a joint right to purchase).

242. E.g., N.H. REV. STAT. ANN. § 356-C:5(I) (1984) ("Each tenant shall have 60 days
from the time of receipt of the sales documents to exercise his exclusive right to
purchase."); WIS. STAT. ANN. § 703.08(1) (West 1981) ("A tenant has the exclusive option
to purchase the unit for a period of 60 days following the date of delivery of the no-
tice."). The New Hampshire statute seems unclear whether a tenant has actually exer-
cised an option to purchase by notifying the landlord within 60 days of an intent to
purchase or if the conveyance must occur within the 60 day period. Similarly, must a
Wisconsin tenant purchase the condominium unit within 60 days after receiving notice
of conversion? If not, must the transaction be completed within a definite time frame? A
more definite approach requires a tenant "to purchase the unit during that [60]-day pe-
riod." UNIF. CONDOMINIUM ACT § 4-112(b) (1980).
payment, by denying a tenant's request to insert a liquidated damages clause, or financing contingency clause. Although these topics are important, a tenant is still likely to be most concerned with the amount of the unit's selling price. No state or local legislature appears to have established any direct controls over this variable. A common legislative approach prohibits a landlord from offering to sell a condominium to a third party purchaser, during a stipulated time period, at more advantageous terms than those offered to the tenant occupant.

Section E(3) of the Model Act establishes a seventy-five day protected period. Although seemingly directed toward promoting a reasonable purchase price for the tenant, a landlord can nevertheless satisfy the statutory requirement by offering a purchase opportunity to a tenant at an extravagant price that the tenant cannot accept, and then offer the same unit on the open market with identical terms during the following seventy-five day period. This procedure will only be attractive to a landlord who does not wish to sell a unit immediately, but desires to fulfill the tenant purchase option requirements. By following this route, the tenant's right of first refusal has been negated, the tenant has received notice to vacate, and the landlord may now sell the condominium unit at any time, to any purchaser, and at any mutually agreeable price.

243. *E.g.*, D.C. CODE ANN. § 45-1634(b) (1986): "The owner shall not require the tenant to pay a deposit of more than 5 percent of the contract sales price in order to make a contract. The deposit is refundable in the event of a good faith failure of the tenant to perform under the contract."

244. A tenant may be reluctant to contract for the purchase of a condominium unit if the landlord could specifically enforce the agreement upon the tenant's default. Liability can be limited by inserting a liquidated damages clause, such as the following: "If the Purchaser shall default under this contract, the Seller shall retain the sum paid by the Purchaser on the execution hereof as liquidated damages, and the retention of said sum shall be the sole remedy of the Seller." M. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY 27 (2d ed. 1963).

245. Many buyers must receive a loan in order to purchase real estate. Thus the tenant (buyer) may wish to condition the purchase and sale agreement upon obtaining the necessary financing. The following clause serves as a model:

The BUYER agrees to apply promptly for a mortgage loan from an institutional lender of not less than $33,000, payable in not less than 20 years at a rate of interest not to exceed 8 1/2% per year. If the BUYER fails to obtain such a mortgage loan, all payments made hereunder by the BUYER shall be refunded forthwith and all other obligations of the parties hereto shall cease and this agreement shall be void and without recourse to parties hereto.

T. BENNETT & M. PRAGUE, ESSENTIAL REAL ESTATE PRACTICE AND PROCEDURE I-80 (1976) (Massachusetts Continuing Legal Educ.—New Eng. Law Inst., Inc.).

246. See *supra* note 235 and accompanying text.

247. The Uniform Condominium Act requires the significantly longer period of 180 days for governmental control over the unit sales terms offered to the public. *Supra* note 235; see *supra* note 160 and accompanying text.
Although a landlord can nullify a tenant's purchase option in this manner, sturdier legislation than the Model Act should be avoided. If a legislature attempts to place direct controls upon the selling price, such as by establishing formulae for determining the price or by requiring a tenant discount, the legislation may be subject to constitutional challenge. Forcing a landlord to sell a condominium unit at an established or discounted price seems to raise serious substantive due process and taking issues that cannot be countered by analogy to the justification for rent controls. Regulation of rent levels during a rental housing shortage allows the landlord to remain the owner of the rental property. The same legal argument cannot be applied to a statute requiring a conveyance of real property at a controlled price. The basic concept of a tenant right of first refusal is acceptable because a landlord voluntarily offers to sell a condominium. The usual form of legislation only requires that the current unit occupant has the first opportunity to purchase. If the tenant can pay the selling price, then the valid objective of avoiding housing displacement has been achieved. Accomplishing this objective by legislatively creating a "special deal" for the tenant, however, denies the landlord the right to sell for the highest market price. Perhaps this reasoning has dissuaded legislators from strengthening the presently popular form of "first refusal" law.

Landlords may decide to offer reduced selling prices to tenants voluntarily. "Insider discounts" are a common feature of condominium conversion. Often the best interest of the landlord is to offer such a discount to tenants. Although the amount of the discount varies among locales and in some instances is directly attributable to the overall strength and structure of the jurisdiction's condominium conversion controls, the Model

248. See supra notes 71-76 and accompanying text for a consideration of substantive due process standards as applied to condominium conversion legislation. See supra notes 77-141 and accompanying text for a similar discussion of condominium conversion laws subject to "taking" claims.

249. See supra note 74.

250. See supra notes 236-37 and accompanying text.

251. Tenant discounts appear to be most significant in New York City due to the restrictive nature of local conversion controls. Discounts ranging from 25% to 75% below market value appear to be common. Moreover, some developers offer significant discounts coupled with full financing of the remaining balance at low interest rates. McCain, Co-op Conversions Give N.Y. 'Insiders' Incredible Bargains, Boston Globe, Apr. 14, 1985, at 31, col. 1; Oser, Eviction-Plan Co-op Sales Still Strong In Manhattan, N.Y. Times, Aug. 28, 1983, § 8, at 7, col. 1.

During the 1970's, 70% of the nation's conversions occurred in the New York City metropolitan area. 1980 HUD Study, supra note 3, at IV-8. To regulate this high activity
Act avoids any attempt to control the selling price of a tenant’s converted rental unit.\textsuperscript{\textit{252}}

Section E(3) of the Model Act safeguards the tenant by providing for liquidated damages and financing contingency clauses in the executed contract of sale. Section E(4) declares a purchase right of first refusal and all rights under a contract of sale as personal rights of the tenant. This seems prudent because landlords become justifiably outraged when “insider discounts” or purchase contract rights are assigned.\textsuperscript{\textit{253}}

conversion center, the New York State Legislature enacted strict controls designed to safeguard as well as benefit tenants. Eviction and noneviction plans are the two alternatives available to a project sponsor. An eviction plan requires that “at least fifty-one percent of the bona fide tenants in occupancy of all dwelling units in the building” agree to purchase their unit. N.Y. GEN. BUS. LAW § 352-eeee(1)(c) (McKinney 1984). If the project sponsor fulfills the statutory requirements, certain nonpurchasing tenants may be evicted following a notice period. In 1982, the state legislature increased the required percentage of purchasing tenants necessary for an effective eviction plan. The amendment, increasing the requisite number of buyers from 35% to 51% resulted in a dramatic decrease in the filing of eviction plans. Gutis, \textit{Eviction Plans Fading Fast as a Road to Conversion}, N.Y. Times, Feb. 2, 1986, § 8, at 7, col. 1. Project sponsors are generally unable to generate the significant tenant purchasing interest necessary to meet the increased statutory percentage requirements. \textit{Id}.

Under a noneviction plan, the sponsor must receive executed agreements for the purchase of “at least fifteen percent of all dwelling units in the building.” N.Y. GEN. BUS. LAW § 352-eeee(1)(b) (McKinney 1984). The 15% calculation may include units being bought by occupying tenants and bona fide third party purchasers representing “that they . . . intend to occupy the unit when it becomes vacant.” \textit{Id}. Nonpurchasing tenants are legislatively entitled to reside indefinitely within a rental unit.

The Model Act proposed in this Article virtually ignores the New York program. The tenant consent requirement seems extreme and a similar legislative provision was recently invalidated as a standardless delegation of legislative power. Hornstein v. Barry, 530 A.2d 1177, 1181-85 (D.C. 1987). The continued lure of conversion projects in Manhattan may best be explained by the magnetism of New York City real estate ventures—where a monetary profit for a project sponsor is still apparently available. It is unlikely that the New York City program could survive in less active real estate markets because it would thwart conversion activity and the concomitant benefit of offering home ownership opportunities.

Tenant purchasers in Connecticut and New Jersey do not benefit from deeply discounted prices “because the laws protecting tenants’ rights to stay on are so light that they do not create the pressures that force New York sponsors to offer the units at far below true value. Insider prices in these states are therefore usually not more than 15 percent below market value.” Brooks, \textit{With Conversion Comes Hard Choice for Tenants}, N.Y. Times, Oct. 28, 1984, § 12, at 72, col. 1.

Under a different approach, a landlord may transfer cash payments to a tenant upon the condition that the tenant relinquish the purchase right to the occupied unit and vacate the premises prior to expiration of the rental agreement or any extended term provided by local law. In Boston, such tenant “buy-out” amounts have varied from $750 to $21,000 with many offers in the $10,000 range. Ball, \textit{Tenant Buy-Out a Key to Condo Conversions}, Boston Globe, Nov. 2, 1985, at 1, col. 2.

252. See Model Act § E, \textit{supra} Part IV.

253. A common practice in Manhattan involves a tenant receiving funds from a third party to enable the tenant to purchase at the “insider price.” The tenant then sells the unit to the third party financier for a profit that was agreed upon prior to the loan. See
As a related matter, the Model Act also establishes a procedure for determining whether a tenant has exercised a purchase right of first refusal. A third party purchaser may wish to ascertain that this right no longer exists. Section E(5) addresses this issue and provides that a tenant may waive the right only subsequent to receiving the written purchase option. Note that the tenant's written waiver does not permit the landlord to accelerate the date upon which the landlord may offer the unit for sale to the public. This aspect of the Model Act may provide a slight safeguard against a landlord requesting an inordinately high purchase price from a tenant who does not wish to relocate. Even with a written waiver, the landlord must wait until expiration of the entire thirty day period commencing from the date upon which the tenant received the purchase right of first refusal before offering the unit to third party purchasers. 254

6. Compensation for tenant relocation—State legislation offering only an extended possessory term or an opportunity to purchase a condominium seems of limited benefit to preconversion tenants who do not desire or cannot afford to purchase their apartments. Accordingly, certain state and local governments have formulated additional "relocation assistance" packages. The mildest example of such regulation requires a landlord who converts a rental housing accommodation to assist in paying a tenant's moving expenses. A more extreme legislative approach demands a landlord's active involvement in locating suitable housing for displaced tenants. This protection is generally reserved for elderly, handicapped, or financially disadvantaged tenants. 255


Another purchase approach in New York City centers upon a tenant signing a contract to purchase a unit at the "insider price" and then assigning (for consideration) the purchase rights to a third party prior to the conveyance. Monetary compensation for the tenants tends to be about one quarter of the "insider price." See Brooks, Selling Rights in Co-ops, N.Y. Times, Jan. 19, 1986, § 8, at 1, col. 1; Brooks, supra note 251, at 72, col. 1. Although the Model Act cannot prohibit a purchasing tenant from reselling the unit, it regulates any prepurchase assignment of rights by the tenant.

The transfer of purchase rights has been legislatively sanctioned in the District of Columbia, if the tenant assigns those rights "to an agency or instrumentality of the District or federal government." D.C. CODE ANN. § 45-1635 (1986).

254. Legislative restrictions upon an attempt by a landlord to circumvent the tenant's right of first refusal are considered infra notes 309-14 and accompanying text.

255. E.g., D.C. CODE ANN. § 45-1621 (1986); N.J. STAT. ANN. § 2A:18-61.10 (West 1987). These programs are considered infra notes 268-97 and accompanying text.
The Model Act follows the typical legislative pattern requiring a compulsory payment by the landlord.\textsuperscript{256} The Act also, however, seeks to eliminate the confusing formulae and overly intricate procedures\textsuperscript{257} associated with some existing regulations. Certain legislative approaches include a statutory format entitling a tenant to compensation for those actual moving expenses falling within a stipulated monetary range.\textsuperscript{258} Such laws appear to require a tenant to document actual moving expenses. At least one statute appears to require a tenant to utilize the services of a professional mover in order to be compensated.\textsuperscript{259} Questions also

\textsuperscript{256} In Virginia, for example, the compulsory relocation expense may not exceed “the amount which the tenant would have been entitled to receive, . . . if the real estate comprising the condominium had been condemned.” VA. CODE ANN. § 55-79.94(g) (Supp. 1987). Condemnation values, however, are often difficult to compute due to the application of various standards. See 3 P. ROHAN, CONDEMNATION PROCEDURES AND TECHNIQUES § 8A.02 (1987).

\textsuperscript{257} For example, the Massachusetts condominium conversion statute requires relocation expense compensation “only as long as the tenant voluntarily vacates the housing accommodation for which recovery of possession is sought on or before the expiration of the notice period.” Act approved Nov. 30, 1983, ch. 527, § 4(c), 1983 Mass. Acts 926, 930-31 (emphasis added). Apparently, the legislature intended tenants to be entitled to compensation only in those cases where the landlord-developer requests the tenant to vacate the rental unit prior to the expiration of the notice period. This approach is confusing, technical, and illogical. It fails to recognize that the tenant who chooses to vacate at the termination of the notice period is probably departing due to the condominium conversion and encountering moving expenses.

\textsuperscript{258} Id. at 930 (The converter “shall pay . . . relocation benefits for the actual, documented costs of moving, not to exceed seven hundred and fifty dollars per housing accommodation.”); Md. REAL PROP. CODE ANN. § 11-136(h)(1)(i) (Supp. 1987) (“The owner shall . . . reimburse the household for moving expenses . . . up to $750 which are actually and reasonably incurred . . . ”).

\textsuperscript{259} D.C. CODE ANN. § 45-1621(b) (1986) (“An owner shall pay the tenant only if the tenant provides a relocation expense receipt or a written estimate from a moving com-
arise concerning the components of the total moving costs. Are brokers' fees, telephone and utility installation charges, and apartment cleaning costs included? Should compensation depend upon the converted apartment having been furnished or unfurnished at the commencement of the tenancy?\footnote{260}

Flexible compensation standards invite further confusion. One state statute fails to establish a monetary limitation upon a landlord's required contribution and merely stipulates that a lessee must be reimbursed for "reasonable expenses" associated with a relocation within a fifty-mile radius.\footnote{261} This formulation invites litigation concerning the reasonableness of such an expense, particularly when a relocation award also depends upon a tenant vacating the unit "immediately upon" receiving actual notice of conversion.\footnote{262} A final example of faulty legislation permits a landlord to base relocation compensation upon the amount of a tenant's rental payments.\footnote{263} This practice may unevenly benefit certain tenants, particularly in communities where some, but not all, residential units are subject to rent control.

The basic concept of landlord-funded relocation compensation is desirable as a balm for displaced tenants. Section F of the Model Act approaches the topic in a direct manner and addresses the following concerns: (1) determining a reasonable compensation amount; (2) ascertaining the individuals entitled to the award; and (3) adopting a method designed to ensure that the tenant actually receives the funds.

Burdensome technical difficulties may be avoided by stipulating a uniform dollar amount to be contributed by the landlord who converts the apartment. The amount of $750 suggested by section F(1) fits within the range established by existing legislation.\footnote{264} By simply selecting a reasonable and definite dollar con-
tribution, the Model Act avoids investigating whether tenants have retained the services of professional movers, whether receipted moving bills should be produced, and whether the amount of the monetary award should depend upon the amount of tenant rental payments, the size of the tenant household, or the tenant's income.\footnote{Any compulsory assistance of this type is an additional cost to the converter. Emphasis should therefore be placed upon determining an equitable dollar amount, achieving uniformity of rules, and creating an uncomplicated procedure for satisfying these obligations. Statutorily required relocation compensation should not be so burdensome as to influence owners to refrain from converting rental property.}

Under the Model Act, a tenant seeking relocation compensation must not be in arrears in rental payments. Conversely, a landlord must conform with all laws concerning return of a tenant's security deposit, if any, in addition to paying the relocation amount. The Act states that a landlord owes a compensation award only to those tenants entitled to receive notice of the conversion and to those tenants entering into a rental agreement subsequent to, but unaware of, the Master Deed recording. Moreover, the Model Act proposes that a relocation lump sum payment of $750 be awarded per tenant household. This money would then be divided among tenant occupants of the household.

A tenant household should not be forced to pursue a landlord for payment of the sum after the tenants have vacated the rental

\begin{quote}

A recent nationwide survey, involving only respondents who moved within the prior 12 months, reveals that 55% of those responding moved themselves without professional assistance or rental vehicles. Another 21% moved themselves with the assistance of rental equipment. Sordillo, Move, Boston Globe, Aug. 15, 1986, at 25, col. 1, 28, col. 1.

Alternatively, moving four rooms of furniture a distance of 40 miles costs $1100 when the packing and transport is performed by professional movers. Id. Thus a relocation amount of $750 seems to gauge adequately the compromise between self-moving and retaining professional assistance. Nevertheless, a legislature may decide to require a higher relocation payment due to increased moving costs in a particular state, or to reflect a local cost of living increase.

Los Angeles, California, adopted the commendable practice of selecting a uniform compensation amount for relocating tenants, exacting a lower uniform payment of $1000 for nonelderly and physically able tenants. LOS ANGELES, CAL., MUNICIPAL CODE ch. IV, art. 7, § 47.06(D)(1)(a)(4) (1981).

265. Limiting relocation compensation only to those tenants with gross income falling below a minimum threshold would complicate an otherwise simple procedure. Such legislation should require that proof of tenant income be presented. Connecticut appears to be the only state adopting the income cutoff approach. CONN. GEN. STAT. ANN. § 47-287(c) (West Supp. 1987).
\end{quote}
Similarly a landlord should not be obligated to compensate a tenant prior to the tenant's removal. The Model Act introduces a compromise position involving a municipal oversight authority. The municipal office or board acts as the depository of the compensation payments. The landlord must deposit the payment with the oversight authority within three days following the tenant's relocation or at least three days prior to the landlord's conveyance of the tenant occupied unit to a third party purchaser. The tenant may reclaim the amount within six days of vacating the apartment. The municipal office will release the payment upon receiving a signed statement from the landlord or presentation of other information indicating that the unit is vacant.

Section F(3) of the Model Act imposes the responsibility of paying relocation compensation upon the landlord "who converted the building" and not upon a third party purchaser of a unit. The latter individual may be a "landlord" under traditional notions of property law, but not for purposes of this statutory section.

7. *Special tenants and special protections*— The legislative bodies of various states and communities have determined that the condominium conversion process usually has profound effects upon certain tenants. Accordingly, they have enacted stronger protections for these individuals. Although these laws often benefit both handicapped and low income tenants, elderly tenants comprise the most frequently protected group.

266. A relocating tenant should not be further burdened with the possibility of initiating litigation in order to recover relocation expense money from a recalcitrant landlord. Some tenants may forego the payment rather than endure the rigor, complexity, and duration of court involvement. For these reasons, certain seemingly helpful statutory provisions may not prove beneficial to tenants. *E.g.*, D.C. Code Ann. § 45-1621(d)(3) (1986) ("[T]he tenant has a private right of action to collect the payment and is entitled to costs and reasonable attorney fees for bringing the action.").

267. See Model Act § F(3), *supra* Part IV.


Studies indicate that though the elderly constitute only twenty percent of conversion-displaced tenants, they often suffer the most grievous wounds inflicted by the loss of their apartments to condominium ownership. The security and stability of a residence is most important to the elderly. A forced disruption of home life, accompanied by a change of environment, can produce severe trauma. The elderly are also often financially strained by high rental payments. In 1976, sixty-five percent of elderly tenants expended more than twenty-five percent of their annual income for rent. Sixty percent of those who earn less than $12,500 are elderly. Their forced relocation probably entails the payment of increased rental costs. Unlike younger displaced tenants, the elderly are often incapable of seeking any form of employment to offset rising housing costs. Handicapped and low income tenants may similarly experience the impact of financial limitations upon locating suitable alternative housing. Moreover, handicapped tenants may encounter the additional burden of locating housing suitable to accommodate their physical challenge. For these reasons, the relationship between condominium conversion and elderly tenants, as well as handicapped and low income individuals, has not passed unnoticed by legislators.

Sections D(1) and G of the Model Act recognize the special needs of these tenants and attempt to provide reasonable protections for them.

a. Definitions— Most relevant state statutes require a tenant to be at least sixty-two years of age to be considered elderly for purposes of condominium conversion laws. Statutes set...
forth varying definitions of handicapped,278 disabled,279 and "financially disadvantaged."280 But other critical issues are often unaddressed by current legislation. For example, the following questions are left unanswered: (1) Should legislative protection be available only if the rental unit is the tenant's principal residence? (2) Should an income or means test be applied to elderly and handicapped tenants? (3) Should a legally permitted occupant who is not a tenant be afforded any benefits due to age, physical infirmity, or low income status?

Section C of the Model Act establishes that an elderly, handicapped, or low income tenant must have resided in the subject apartment or an apartment within the same building or structure for a period of one year prior to the tenant's receiving notice of conversion.281 The Model Act intends to insure that a tenant has a more than transient interest in the rental unit and the locale. Moreover, an elderly or handicapped tenant with a current annual income exceeding $40,000 is ineligible for special protection. A state legislature may decide to vary this amount,282 but at some income level the hardships of displacement would


279. E.g., Va. Code Ann. § 55-79.94(f) (Supp. 1987) ("'Disabled' means a person suffering from a severe, chronic physical or mental impairment which results in substantial functional limitations.").

280. E.g., Md. Real Prop. Code Ann. § 11-102.1(f) (Supp. 1987) ("To qualify for an extended lease [the] . . . [a]nnual income for all present members of your household must not have exceeded . . . 80 percent of applicable median income . . . .").

281. To qualify for additional legislative protections, a New Jersey "senior citizen tenant" must demonstrate "that the building or structure has been the principal residence of the senior citizen tenant . . . for the 2 years immediately preceding the conversion recording." N.J. Stat. Ann. § 2A:18-61.24(a) (West 1987).

The Model Act does not require a minimum residency period. All tenants are entitled to a notification period of at least one year. Such tenants are also entitled to a purchase right of first refusal. See supra note 239 and accompanying text. A minimum residency period is required of "special tenants" due to the "two year possessory term awarded to them by the Model Act. See infra notes 286-88 and accompanying text.

282. The New York State Legislature formerly established a $30,000 annual income limitation for senior citizen eligibility relative to special conversion protections. The method for determining this income requirement is discussed in Conforti v. Goldberg, 118 Misc. 2d 590, 463 N.Y.S.2d 132 (App. Term 1983). The $30,000 income limitation was repealed by Act approved July 20, 1982, ch. 555, § 2, 1982 N.Y. Laws 1474, 1475-81; and no income limitation currently applies in New York.

The relevant New Jersey legislation requires senior citizens to apply for protected tenancy status and demonstrate that their total household income "does not exceed an amount equal to three times the County per capita personal income." N.J. Stat. Ann. § 2A:18-61.28(c) (West 1987). The New Jersey Supreme Court noted that the amount of a senior citizen tenant's income is a proper concern when judicially determining the remaining length of the tenant's possessory term.
be significantly reduced. Finally, the Model Act offers certain additional protection to the spouse of an elderly tenant. If the elderly tenant dies after receiving notice of conversion and the surviving spouse is at least sixty-two years of age at the time of the elderly tenant's death, then the surviving spouse is entitled to all statutory protections that would have otherwise been available to the deceased elderly tenant. An alternative approach would require a spouse to be sixty-two years of age at the earlier date when the notice of conversion is actually received by the elderly tenant. This formulation, however, would seem to hamper the Model Act's intent to provide an elderly surviving spouse, already experiencing the loss of a husband or wife, with a reasonable period of time within which to relocate. By limiting elderly, physically disabled, and low income status only to tenants, the landlord is not required to offer benefits to a household which contains nontenant elderly, handicapped, or low income persons. Although sentiment may strongly tend toward broadening the protected class, it seems inequitable to burden a landlord with additional duties when the beneficiaries would not be tenants. Expanding the umbrella of statutory protection might also discourage landlords from renting to households with elderly, handicapped, or low income members.

Because a special tenant will receive additional benefits under section D(1) of the Model Act, the tenant is required by section G(1) to present proof of eligibility to the landlord. Furthermore, section G(2) establishes a mechanism for determining when the tenant is entitled to these benefits.
special status may have terminated. But it should be emphasized that section D(1) of the Model Act offers all tenants a minimum remaining term of one year following notice of condominium conversion. If elderly, handicapped, or low income tenants lose their special status, then some portion of the one year minimum term may be available.

b. Length of extended term— The principal benefit awarded to special tenants by existing legislation appears to be the opportunity for them to occupy a converted rental unit for a longer period than that afforded to other preconversion lessees. Notice of condominium conversion provides most tenants with a right to possess a rental unit for a period of 120 days or until expiration of the rental period, if longer. But special tenants are allowed possessoriy rights for a period ranging from two years to forty years, or even a life tenancy. When selecting the appropriate length of the extended term, a legislature should question the reason(s) for adopting this special tenant protection. If the legislative intent is to provide elderly, handicapped, or low income tenants with a reasonable opportunity to evaluate alternative housing sites, although realizing that special needs must be accommodated, then a period of two years seems appropriate. To expand the term beyond two years may exacerbate the problem by encouraging the tenant to continue to reside in the converted apartment. A forced relocation upon expiration of a lengthier term may impact more harshly upon a tenant who has become older and who probably will face higher rental rates and a tighter rental market. The only way to guard against such eventualities is the grant of a life estate. Although this approach is sometimes adopted, it results in an undue burden upon a landlord. Section D(1) of the Model Act chooses to avoid the creation of a life tenancy or any term approaching such lengths,

285. See supra note 223 and accompanying text.


288. E.g., Conn. Gen. Stat. Ann. § 47a-23c (West Supp. 1987) (special tenants residing in Connecticut are the beneficiaries of legislation effectively prohibiting their eviction except when they violate their rental agreement); see also Oakland, Cal., Ordinance No. 10,203, § 7-7.05(A)(6) (1982) (tenants in units containing "a tenant 62 years or older shall be provided a lifetime lease on their unit").
settling upon a two year term as representing a suitable compromise between the interests of the conversion-minded landlord and the special needs of elderly, handicapped, and low income tenants. Moreover, the presence of a special tenant residing in a converted rental unit may result in a coterminous period of possession for other lawful unit occupants such as family members.

c. Miscellaneous considerations—Several other concerns must be addressed by a legislature considering the issue of special tenants. The statutorily provided benefit should be viewed as personal to the special tenant and nontransferable. During the special tenant’s extended term, the landlord is entitled to periodic rent increases and is precluded from altering other provisions of the rental agreements. Moreover, a special tenant should be entitled to a purchase right of first refusal.

Other provisions of the Model Act deal with the topic of relocation compensation. Certain state and municipal legislatures have also promulgated laws establishing relocation assistance programs. Such assistance programs may require more than a landlord’s payment to a special tenant of a certain sum to defray moving expenses. The relocation assistance benefit may demand that a landlord locate comparable housing for the displaced lessee. In lieu of finding comparable housing, a tenant’s term may also be further extended or an additional payment made to a tenant. Relevant existing laws of this sort range from exam-

289. MICH. COMP. LAWS ANN. § 559.204b(8) (West Supp. 1987) (“A lease subject to an extended lease arrangement shall not be assigned, devised, subleased, or transferred by the qualified senior citizen or qualified handicapped person.”).
290. See Model Act § D(2), supra Part IV.
291. Id.
292. See supra notes 234-54 and accompanying text.
293. See Model Act § F, supra Part IV; supra notes 255-67 and accompanying text.
294. [T]he landlord may elect to relocate any tenant into a comparable replacement rental unit satisfactory to the tenant. ... [C]omparability shall be determined from the following factors: size; price; location; proximity to medical and recreational facilities, parks, community centers, shops, transportation, schools, churches, and synagogues; amenities.

LOS ANGELES, CAL., MUNICIPAL CODE ch. IV, art. 7, § 47.06(D)(1)(b) (1981).
295. New Jersey legislation requires that a landlord offer a “comparable housing” opportunity to those tenants facing condominium conversion and requesting such housing. If the landlord does not provide comparable housing to the affected tenant, a court may grant to the tenant a one year stay of eviction, which can be renewed up to a total period of five years. N.J. STAT. ANN. § 2A:18-61.11(a) (West 1987). The landlord may, however, limit a tenant to a one year stay of eviction by providing “a tenant with hardship relocation compensation of waiver of payment of 5 months’ rent.” Id. § 2A:18-61.11(c). The waiver of a tenant’s rental payment is a landlord’s alternative to providing comparable housing. Mountain Management Corp. v. Hinnant, 201 N.J. Super. 45, 51, 492 A.2d 693, 696 (App. Div. 1985). Pyramid Investments v. Leon, 212 N.J. Super. 494,
ple of questionable legislative judgment and incomplete drafting\(^{296}\) to those of an overly regulatory nature.\(^{297}\) The Model Act views the concept of mandatory "relocation assistance" as distinct from the concept of relocation compensation. The former requirement imposes an impermissible burden based solely on the special tenant's proof of residence at the time when notice of conversion was tendered. For this reason, the proposed condominium conversion statute does not provide for optional or mandatory relocation assistance to tenants.

8. Governmental oversight, penalties, and enforcement—Stiff penalty and enforcement provisions coupled with the creation of a governmental oversight authority urge converting landlords to comply with the various requirements of the Model Act. Documentation abounds concerning attempts by landlords to avoid compliance with statutory provisions benefiting preconversion tenants.\(^{298}\) Although crafting problem-free legislation is virtually impossible, existing conversion statutes fail to contemplate adequately the sanctions to be imposed upon statutory violators. Most statutes simply offer a criminal or civil liability provision\(^{299}\) without adequate explanation concerning the rights of disadvantaged parties. The Model Act focuses detailed attention

---

515 A.2d 808 (Law Div. 1985), discusses the consequences of failing to offer comparable housing in a timely manner.

296. Massachusetts, for example, requires landlords to assist special tenants in locating "comparable rental housing within the same city or town in which such tenant resides which rents for a sum which is equal to or less than the sum which such tenant had been paying for the housing accommodation" in which the tenant resided when the conversion notice was received. Act approved Nov. 30, 1983, ch. 527, § 4(d), 1983 Mass. Acts 926, 931. Special tenants residing in Massachusetts are also entitled to a two year notice period. Id. § 4(a)(iii). Thus a landlord must locate comparable rental housing at the rental rate that the tenant was paying two years earlier, when the notice was provided. This may prove to be a difficult, if not impossible, task. Also, the legislation fails to indicate the time period for which the new unit must remain at this rental amount.

Another criticism of the statute concerns the omission of a thorough definition of "comparable housing." Although the "rental rate" factor is noted, other issues relating to "comparability" are avoided. Los Angeles provides a detailed listing of issues affecting the comparability of replacement housing. See supra note 294.

297. For example, the relevant Los Angeles ordinance requires a landlord to pay up to $2500 to tenants relocating due to condominium conversion, to provide each tenant with a "reasonably complete and current list of vacant and available rental units within a one and one half mile radius" of the converted building, to make a good faith effort to transport tenants in order to inspect units, and even to hire an ambulance to assist disabled tenants. Los ANGELES, CAL., MUNICIPAL CODE ch. IV, art. 7, § 47.06(D)(1)(a)(1)-(4) (1981).

298. E.g., Snyder, supra note 238, at 1, col. 1; Wells, Renters' Rights, Boston Tab, Mar. 12, 1985, at 1, col. 4; see also supra note 238.

299. E.g., Act approved Nov. 30, 1983, ch. 527, § 5, 1983 Mass. Acts 926, 931-32 ("Any owner who converts residential property in violation of . . . shall be punished by a fine of not less than one thousand dollars, or by imprisonment of not less than sixty
upon this broad topic by presenting a proposal designed to safeguard tenants’ rights, and at the same time respecting the need of a landlord-converter and third party purchasers to avoid burdensome detail.

a. Waiver of a tenant’s statutory rights—Section H of the Model Act explicitly bars a landlord from including a provision in a rental agreement that may be interpreted as a tenant waiver of individual rights arising under the statute. Section H also prohibits the landlord from manifesting any wrongful behavior designed to prompt a tenant to vacate a rental unit.

The anti-harassment provisions of Section H seem appropriate despite a recognition that general legislation governing residential landlord and tenant affairs often contains similar terminology.300

b. Governmental oversight—If a condominium conversion act does not create or designate a governmental department or agency to oversee the application of the statute, many tenants will probably not be aware of their statutory rights. Strong tenant protections will weaken if a legislature fails to provide an oversight mechanism for coercing adherence to the statutory requirements. By establishing a governmental oversight authority, the Model Act seeks to achieve the objectives of tenant protection and notice and still avoid miring the conversion process in excessive bureaucratic entanglement.

Although the proposed conversion statute mandates state preemption of municipal regulation of condominium conversions, the Model Act is also designed to permit the state to select various counties, districts, or communities to serve in an oversight capacity. The state legislature should determine areas of varying conversion activity and then designate an appropriate county or municipal office to coordinate the application of the statute in that sector.301 For example, many communities will probably experience little conversion activity. Accordingly, a single municipal clerk’s office might monitor the conversion process in a number of neighboring communities. On the other hand, a large urban area may be monitored by a local municipal office. Al-

300. E.g., MASS. GEN. LAWS ch. 186, § 14 (1986).

301. Section I(1) of the Model Act creates a state legislative preference for county or municipal administrative offices to monitor condominium conversion activity. At these levels, responsible officials may be more attentive to local concerns. This legislative preference rebuts the concept of a state office (e.g., Office of the Attorney General) regulating the process and serving in an oversight capacity.
though additional costs are imposed upon those communities designated to provide monitoring, this reasonable cost may be partially assessed to the conversion project sponsor. Such a legislative requirement, termed a "certification fee," exists in the District of Columbia. 302 Under section I(7) of the Model Act, the state determines a reasonable fee to be paid upon the conversion of each rental unit. It is anticipated that the appropriate monitoring office collects the fees and forwards them to a central location for distribution across the state to defray the cost of administering the statute. The amount of the "certification fee" should be set by state regulations promulgated under the authority of the model conversion legislation.

Involving county or municipal offices and the personnel of various Registries of Deeds will compel landlords who are converting rental units to adhere to the dictates of the Act. Within this format the proposed statute attempts to urge voluntary landlord compliance amidst an atmosphere of moderate regulation.

c. The converting landlord and oversight authorities—Section I(2) of the Model Act requires that a converting landlord file certain documents and an affidavit with the designated oversight office. More specifically, the landlord must deposit a copy of all conversion-related materials that have been delivered to each tenant in accordance with the terms of the statute. These records must be accompanied by a signed affidavit stipulating: (1) the date and method of document delivery, (2) the name of each tenant recipient, and (3) the names of those tenants, if any, previously residing in the subject unit and vacating their rental housing accommodation within the 180 day period prior to Master Deed recording. Also, the landlord must, in writing, set forth a basis for rebutting the presumption of a condominium conversion eviction 303 relating to any such departed tenant. In this way, the landlord is forced to explain any tenant eviction

302. D.C. CODE ANN. § 45-1614 (1986) ("An owner who seeks to convert must pay the Mayor a certification fee. The Mayor is authorized to collect and establish the amount of the fee. The certification fee shall be sufficient to cover the cost of administering this subchapter.").

303. A tenant vacating a rental unit within the 180 day period prior to recording of a Master Deed raises a presumption that the tenant is a victim of a condominium conversion eviction. The Model Act seeks to prevent a landlord from evicting a tenant without just cause during the approximate six month period before recording of the constituent documents. If such landlord action is legislatively protected, then a landlord could easily avoid the "tenant protection package" of the Model Act by terminating all tenancies before Master Deed recording. For a more detailed discussion of the condominium conversion eviction issues, see supra notes 145-46, 193-96 and accompanying text.
precipitated by the landlord’s conversion plans. The landlord must sign the affidavit under the penalty of perjury. The affidavit and supporting documentation must be presented to the oversight authority within seven days following delivery of the conversion notice and accompanying materials to the tenant or tenants.

Upon receiving the landlord’s submissions, the authority must notify the appropriate resident tenants. Such notification must alert the resident tenants of the landlord’s belief that the notification requirements of the statute have been satisfied. The authority does not act as an adjudicatory body, but simply reviews the sufficiency and facial validity of the landlord’s submissions. Any aggrieved resident tenant may seek judicial assistance to redress a statutory violation.  

Upon reviewing the landlord’s filings and finding them acceptable, the authority issues a certificate of conversion approval, recorded in the appropriate Registry of Deeds along with the first deed conveying title to the subject unit. Section I(9) of the Model Act bars the personnel of the Registry of Deeds from accepting such a deed for recording absent an accompanying certificate of approval. Moreover, upon subsequent conveyances of the subject unit, each deed must refer to the existence of the certificate and where it is recorded. This latter requirement alleviates the need for Registry officials to investigate the certification issue repeatedly and places the burden upon the party recording the instrument.

d. The converting landlord and the tenant—Section D(1) of the Model Act requires the landlord to deliver to an appropriate tenant a copy of the Model Act along with the notice of condominium conversion. It does not require the landlord to obtain a statement signed by the tenant indicating that the landlord has fulfilled the statutory requirements. This would be unduly burdensome because certain tenants will probably oppose the conversion plans and be reluctant to assist a landlord by providing this information.

e. The third party purchaser—To stipulate that a third party unit purchaser must fulfill all of the “landlord” statutory responsibilities seems inequitable. This individual merely purchases a unit that may house a tenant. If a tenant resides in the conveyed unit, then the market purchaser is defined as a landlord but not the converting landlord. The unit purchaser must honor the tenant’s preexisting possessory right and the

304. See Model Act § J(3), supra Part IV.
Model Act unambiguously adopts this position. But the landlord who converts the unit must provide a tenant with notice of conversion, a purchase right of first refusal, relocation compensation, and other benefits.

Section I(6) of the Model Act requires the converting landlord to provide a prospective market purchaser with a copy of tenant-notification documents filed at the local oversight authority office by the landlord. The landlord is only required to provide a copy of those materials relating to the subject unit. This material must be delivered upon the execution of a purchase and sale agreement relating to the converted unit. Also, the proposed statute mandates that the converting landlord indicate, in writing, the method by which the tenant, if any, relinquished the purchase right of first refusal. The tenant may have expressly waived the purchase opportunity or merely allowed the relevant time period to expire. The converting landlord must also file this information with the oversight authority before it may issue a conversion approval certificate.

By receiving a copy of all relevant documents, the potential market purchaser may determine whether the landlord appears to have satisfied the statutory notification requirements. Any lending institution assisting the purchaser will probably also desire to review this information.

f. Penalties and enforcement—The following discussion expands upon the earlier fragmented presentation concerning the oversight authority, landlords who convert, tenants, and market purchasers. The legislation's liability rules highlight their respective rights and duties.

The Model Act does not empower the oversight authority to undertake investigatory chores. But it may refer incidents of potential violation to the office of the appropriate district attorney or attorney general for investigation. The oversight authority may refer such matters based upon receipt of falsified information submitted by the converting landlord or upon notification of an alleged statutory impropriety. Upon a criminal conviction the offending converting landlord "shall be fined not less than $5,000 or double the amount of gain from the transaction, whichever is larger, but not more than $50,000; or such person may be imprisoned for no more than six months; or both for

305. See supra notes 201-33 and accompanying text.
306. See supra notes 234-54 and accompanying text.
307. See supra notes 255-67 and accompanying text.
308. See supra note 254 and accompanying text.
Although the criminal sanctions provided by section J(2) of the Model Act are primarily directed toward the illegal acts of a project developer, prohibited acts also include the wrongful failure of a third party unit purchaser to permit a tenant's continued possession until the expiration of the conversion notice period.310

A preconversion tenant is entitled to three basic benefits or protections. These include notice of condominium conversion, a purchase right of first refusal, and receipt of relocation compensation. Under the provisions of the Model Act, if an appropriate tenant is occupying the rental housing accommodation, then a landlord will be compelled to provide proper notification and offer the relevant one or two year postconversion, possessory term.311 If the otherwise intended beneficiary of the Act no longer occupies the unit due to a condominium conversion eviction,312 that individual is entitled to recovery for the landlord converter's violation of the Act's civil liability provisions. In this case, section J(3) of the Model Act provides for the tenant to recover double the amount of actual damages suffered or $5000, whichever is greater.313 The Model Act also entitles the tenant to payment by the offending landlord for the tenant's reasonable attorneys fees and court costs. State legislation should clearly indicate the court to which aggrieved individuals may turn for redress of statutory violations.

The violation of another tenant benefit, the right to purchase, proves more complicated to resolve due to the possible presence of a third party purchaser. If the oversight authority issues a certificate of approval, then the documentation submitted by the landlord would comply, at least facially, with the statutory requirements. Sections I(10) and J(5) of the Model Act indicate that so long as the third party purchaser relies upon the landlord-furnished information and the certificate of approval, the conveyance cannot be set aside without a finding that the buyer


310. See Model Act § D(4), supra Part IV. A market purchaser of a converted condominium unit must permit an occupying tenant to possess the unit under the provisions of the Model Act. Any attempt by the unit purchaser to remove the tenant prematurely and without cause violates the Model Act.

311. See Model Act § D(1)-(2), supra Part IV.

312. See supra notes 145-46, 193-200 and accompanying text.

313. The civil liability provision of the Model Act is generally based upon a relevant New Hampshire provision. The New Hampshire legislation requires converting landlords to comply with all provisions of the statute or risk the imposition of significant civil penalties. N.H. REV. STAT. ANN. § 356-C:9 (1984).
did not act in good faith. This finding would require a presentation of evidence by an aggrieved tenant and a judicial resolution favorable to the tenant.

Permitting an aggrieved tenant the right to void a transfer to a good faith purchaser would imperil the public's reasonable reliance upon the Registry of Deeds recording system and would severely impact upon the willingness of institutional lenders to be involved in conversion unit transactions. Section J(4) of the Model Act places liability for the improper conveyance on the offending landlord. If a conveyance to a good faith market purchaser has not yet occurred, then the Model Act entitles the aggrieved tenant to receive the purchase option.

Section F(3) of the Model Act deals with relocation compensation and requires a landlord who converts a unit to deposit the compensatory amount with the oversight authority when the earlier of the following occurs: (1) within three days after the tenant vacates the unit, or (2) no later then three days prior to the conveyance of the unit to a grantee other than the tenant. The latter clause contemplates a unit being sold to a third party grantee who must honor the existing tenant's possessory term. Requiring a tenant, vacating a unit at some future date, to pursue the converting landlord in order to obtain relocation compensation seems inadvisable. Under the terms of the Act, such a tenant may claim the sum deposited earlier at the governmental oversight office. Alternatively, the landlord who converted the unit may reclaim this amount if the tenant remains in the unit after the possessory term expires. But the landlord who converts the unit cannot avoid depositing the relocation compensation because the oversight authority will refuse to issue a conversion approval certification. No third party purchaser acting in good faith would accept a conveyance without the presentation of a valid conversion approval certificate.

Sections I and J of the Model Act offer an oversight authority along with stringent criminal and civil sanctions for violations by converting landlords and third party grantees who act in bad faith. The teeth of the Act lie in these legislative provisions. The statute is designed to achieve an equitable balance between the legislative desires of assuring statutory compliance and avoiding excessive regulation.

314. A New Hampshire statutory provision permits any tenant, who does not properly receive a purchase right of first refusal, to render the sale to a third party voidable if such option is exercised within a limited time period. *Id.* § 356-C:5(II).
CONCLUSION

The condominium conversion of residential rental units offers the attraction of a home ownership opportunity, but also results in the eventual dislocation of those tenants declining to purchase a converted unit. The realities of this process may not be denied or ignored. An equitable legislative response would not ban conversions, offer life tenancies to affected tenants, or present insurmountable legal obstacles to market purchasers interested in acquiring a converted unit. The Model Condominium Conversion Act presented here attempts to balance appropriately the interests of project sponsors, resident tenants, and third party purchasers. A property owner’s right to convert rental units is not unjustifiably denied. The proposed legislation results from a detailed study and comparison of existing laws—highlighting the relevant positive aspects and deleting the negative features. Thus the proposed condominium conversion act combines well-considered provisions announcing the conversion protections afforded to resident tenants and establishing the statutory rights of converting landlords and market purchasers.